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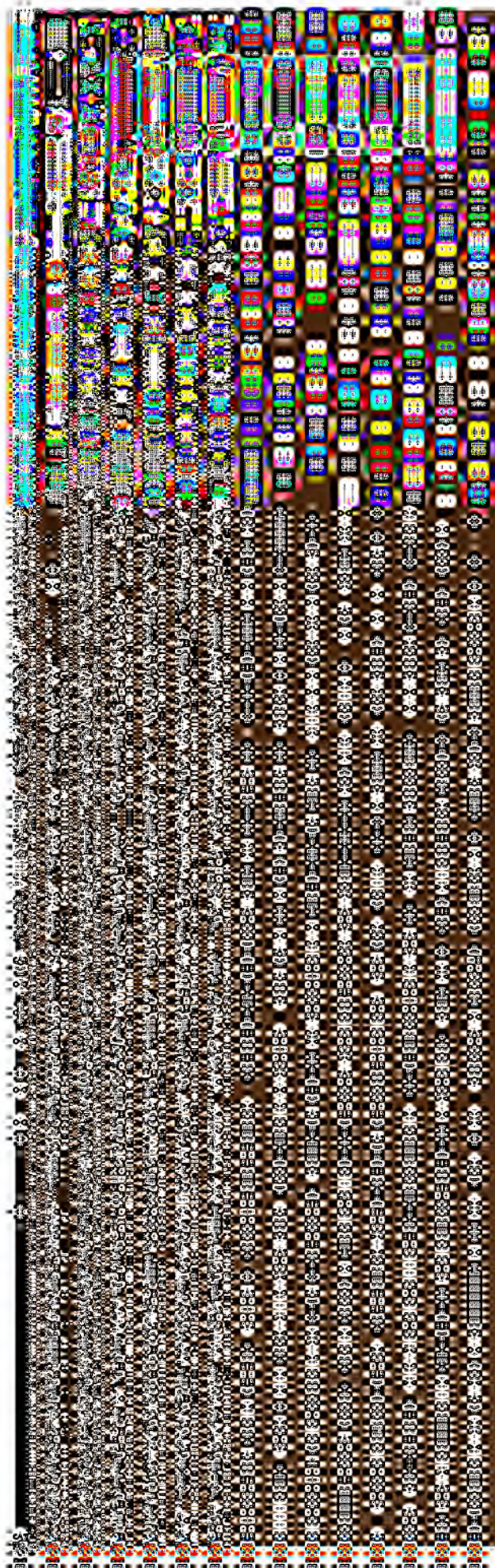
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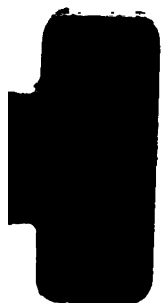
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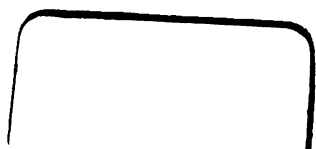
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34

REPORTS OF CASES

ARGUED AND DETERMINED

4801

IN THE

COURT OF CHANCERY

OF THE

STATE OF NEW YORK,

BEFORE THE

HON. LEWIS H. SANDFORD,

VICE-CHANCELLOR

OF THE FIRST CIRCUIT,

WHILE ASSISTANT VICE-CHANCELLOR.

VOL. II.

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P R E F A C E .

THE Constitution adopted by the people of this state in November last, abolishes the court of chancery after the first Monday of July next, (with some temporary exceptions,) and the new supreme court is thenceforth vested with general jurisdiction in law and equity.

It is supposed by some, that this change in our judicial system, renders the publication of Chancery Reports unnecessary if not useless. The error of this opinion may be readily demonstrated.

The Constitution does not interfere in the slightest degree, with the great principles of equity jurisprudence; nor was any such interference avowed by those most zealous for a change in the organization of the courts. Indeed, it is morally certain, that the tendency of the reform in the modes of civil procedure directed by the Constitution, and still more the effect of the Code which it proposes; will be to assimilate the common law actions and remedies to the forms now used in the court of chancery, and ultimately to give to the principles, as well as the forms of equity as heretofore administered, a greater preponderance than they have ever yet had in the jurisprudence of this state. The technical rules of practice, will doubtless be modified and improved; but as few of the cases now reported, relate to those rules, the change will not impair the value of our equity reports.

It may therefore be safely asserted, that well considered decisions of cases in equity, presenting new points, or new applications of important principles, will still be valuable contributions to judicial science. Whether this volume deserves to be thus classed, must be determined by the judgment of the enlightened bar to which it is submitted.

L. H. S.

New York, February 1, 1847.

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CASES IN CHANCERY.

BROOKLYN BANK v. WARING and others.

W. was the accommodation indorser of his son N., on a note to B., payable at the complainant's bank, on the 31st July. By an error of their clerk the note when left for collection, was entered as due 31st August, and was not presented for payment at its maturity, nor any notice of its non-payment given. N. was aware of there being a mistake at the bank as to the time when the note would fall due; but to provide for its renewal in case it should be properly presented, he prepared a new note for the same amount dated 31st July, and his check for the discount, and left the same with his partner who was the notary of the bank, to obtain his father's indorsement on the note, and renew the old note if it were presented on that day. W. on the 31st July called on the notary and indorsed the new note, but nothing was done with it. B. claimed the amount from the bank on the neglect to charge the indorser, and the bank paid B., and then sued W. on the old note. W. defended the suit. Some months after, two large mortgages of W. to the bank, on distinct parcels of land, fell due, and W. desired an extension of payment. The result was an agreement, by which W. paid about one-third of N.'s note, and executed a new mortgage to the bank for the amount of the two former, payable at a future day, and embracing both parcels of land. *Held*, that the mortgage was not usurious.

A doubtful claim prosecuted in good faith, is a good consideration for a promise made on compromising and settling it; and the promise cannot be impaired by showing that the claim was invalid.

And where an indorser, discharged by the laches of the holder, with full knowledge of the facts, yields to the claim of the holder and promises to pay the note, an action on the note can be maintained on such promise.

It seems, that under the circumstances W. was liable as indorser, independent of the new agreement.

Decided in 1843.

THE bill in this cause was filed to foreclose a mortgage of \$22,000, dated August 24, 1838, executed by Waring to the complainants, on lands in Brooklyn. The defence was, that \$1000

Brooklyn Bank v. Waring.

was exacted from W., for the forbearance of the debt, on executing the mortgage, and that it was therefore usurious.

It appeared that the complainants, on receiving this security, cancelled two mortgages which they held against W., one for \$15,000, payable March 16, 1838, and the other for \$7000, on different property, due about the same time. The new mortgage included all the lands which were described in those given up.

The facts proved respecting the \$1000, were these. In November, 1836, N. a son of the mortgagor, gave a note for \$3150, to Mott Bedell, payable in six months, at the Brooklyn Bank, which the mortgagor indorsed for his accommodation. On the 29th of May, 1837, this note was renewed, by a like indorsed note at sixty days ; which was afterwards lodged by Bedell at the bank for collection. By an error of one of the clerks in the bank, the note was entered as falling due on the 31st of *August* instead of *July*, and a bank notice of its maturing on that day was sent to N. On the 31st of July N. was absent in the country, but a few days prior when about to depart, he drew and signed a new note for \$3150, payable to his father, and dated 31st July, and left it together with his bank notice, and his blank check, with his partner, Mr. Covert, with instructions to obtain his father's indorsement, and with it to renew the former note if it fell due while he was absent, filling the blank check with the discount. He further instructed Mr. Covert, if he heard nothing from the note on the 31st July, to give himself no further trouble about it. Mr. Covert was the notary of the bank, into whose hands the current note would regularly come, if it were demanded and protested. W. himself called on Mr. Covert, on the 31st July a little after noon, inquired for the note intended for renewal, and indorsed it. The old note was not presented in form for payment, and no notice of its non-payment was given to W. and therefore Mr. Covert returned the renewal note and check to N. At this time N. was insolvent, and from the testimony it was inferrible that his father was aware of his situation. The error at the bank was discovered ten or twelve days after the note should have been protested. Bedell claimed the amount from the bank, on the ground of their default in charging the indorser ;

Brooklyn Bank v. Waring.

and they wishing to avoid a controversy with Bedell, paid the same to him, and thus became the owners of the note.

In the fall of 1837, the bank sued W. on the note as indorser, which suit was pending when the mortgage in question was given.

When W.'s mortgage of \$15,000, and \$7000, fell due, the bank called on him for payment, and he applied for an extension. A friend of W.'s proposed to the bank a settlement of the suit on the note, in connection with the extension of payment on the mortgages. A negotiation ensued between W. and the bank respecting the mortgages and the note, which resulted in a sealed agreement between them, dated June 6, 1838. This contract recited that W. was indebted to the bank, \$22,000 on the mortgages, and \$1000, being a part of the sum due to the bank on N.'s note; and it provided for extending the payment of the \$22,000, on W.'s giving a single mortgage on the whole premises incumbered by the two then outstanding, and his note for the \$1000 payable May 1, 1839; on which the bank was to cancel the prior mortgage debt, and relinquish all further claim against him upon the note. This agreement was carried into effect on the 24th of August, 1838, and W.'s note was paid at maturity. The bank arranged the residue of the note with N., about the time of entering into the agreement with W.

John A. Lott, for the complainants.

H. F. Clark, for the defendant Waring.

THE ASSISTANT VICE-CHANCELLOR.—When W. agreed to give the note for \$1000, which he alleges was made solely in consideration of the forbearance of the mortgage debt, the bank had an undisputed claim against him for that debt, and a claim for \$3150 more, which he disputed and denied. On a review of the circumstances, I think that the mortgagor has failed to show that the note was given for the alleged forbearance, or as a cover to an usurious transaction.

1. The liability of W. on the note of \$3150, if not clear, was a very serious question. It is not necessary for me to decide the

Brooklyn Bank v. Waring.

point, but I must say that my impression is that he was liable. Nelson, J. in *Mechanic's Bank of N. Y. v. Griswold*, 7 Wend. 165, says "the object of notice is to advise the indorser of his situation, that he is to be held responsible, so that he may take such steps as he thinks proper to indemnify himself against his liability." "Upon the maxim that when the reason for the rule of law does not exist, it ought not to be applied, it has frequently been decided that where the non-payment by the maker and failure of notice to the indorser cannot possibly operate to the injury of the indorser, the omission will not discharge him." And see *Commercial Bank of Albany v. Hughes*, 17 Wend. 94, to the same effect.

Now what possible injury resulted to W. in this instance from the omission? He knew the note was not paid. He knew it would not be paid. He came with that knowledge and for that cause, and indorsed the new note prepared to replace the one which was then falling due. If the old note had gone into Mr. Covert's hands to be protested, and notice had been given, W. would have done no more than he had done already. In fact if it had reached the notary's hands, the note would not have been protested. Mr. W. would have heard nothing from it. And his situation and the extent of his liability in June, 1838, would have been the same precisely as it actually was, with the immaterial exception of the payment of the discount for sixty days, for which his son had provided the check. A defendant in a suit sought to be charged as indorser on a note of \$3150 under circumstances like these, might well congratulate himself on being let off for \$1000.

2. But suppose Mr. W. was not liable on the note after the 31st of July, 1837, and that the complainants' suit would have failed. He knew all the facts—he insisted that he was not liable; yet by the agreement of June 6, 1838, he promised to pay \$1000 of the note, and in August following ratified the promise by giving his note for that amount. It is well settled that evidence of such a promise would sustain an action against him on the note for the amount. (*Tebbetts v. Dowd*, 23 Wend. 379, 411; *Davis v. Gowen*, 5 Shepley's R. 387.) Whether put upon

the ground of waiver, or of a moral obligation which forms a consideration, the consequence is undeniable.

The motives for recognizing and paying a portion of this claim referrible to the manner in which the legal liability was lost, (if it were discharged;) are ample to support the note for \$1000, and it seems to me that it would be inequitable, and do injustice to Mr. W. himself, to hold that these considerations were of no weight with him, and that the forbearance was the sole inducement for assuming the \$1000.

3. There is still another view of this case. The Bank claimed the whole amount of this note against W. The suit at law brought against him, five or six months before the prior mortgages became due, is conclusive to show that the Bank made this claim in good faith, and without the slightest reference to the disposition of it which was subsequently made. The claim was contested, and doubtless with equal good faith. It was then compromised by the payment of less than one-third of its amount. If no other transaction had been connected with it, such a compromise would not have occasioned surprise, and scarcely remark. Probably Mr. W.'s own friends would have declared it a favorable settlement. At all events it is well settled that such a compromise cannot be disturbed. In *Russell v. Cook*, 3 Hill's R. 504, it was decided that a note given upon the settlement of a doubtful claim preferred against the maker, will be upheld, as founded upon a sufficient consideration, without regard to the legal validity of the claim. In *Stoddard v. Mix*, 14 Conn. R. 12, there was a similar decision in a case like the one at bar. There a suit had been brought upon a bill of exchange, against the drawer; and the defence was that the bill had never been presented for payment. The suit was settled by the defendant's giving his note for a part of the bill without costs.

In *Leonard v. Leonard*, 2 Ball & B. 171, it was held that the validity of a compromise cannot depend upon a subsequent adjudication of the rights; and equity will not set aside a compromise of doubtful rights on the ground of its being prejudicial to one of the parties to it. And in *Steele v. White*, 2 Paige, 478, the Chancellor held that when a party in a suit compromises the same, without any fraud or imposition, he cannot be relieved

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from it, although he shows that it was not beneficial to him, or that he had the right to recover in the suit in point of law. The authorities to this effect are very numerous, but these will suffice.

I have no doubt but that the extension of time upon his large mortgage debt, entered into the inducements, which resulted in Mr. W.'s giving the note of \$1000. But it is impossible to hold that this was the only or the chief inducement, when there are so many strong and sufficient reasons for the act, which form a valid legal consideration.

The testimony does not prove any imposition or oppression. The first proposition connecting the \$3150 note with the mortgages, came from Mr. Kimberly, the friend and relative of the mortgagor. What one of the sons relates as having been said in that connection, soon after the note of \$3150 fell due, must have been an error as to time at least; for the mortgages had then been given but a short time, and would not be due in seven or eight months.

But I need not collate the testimony. It does not add to or vary the agreement, as evidenced by the written instrument executed by the parties.

I have not looked into the point of variance between the usury proved and that alleged in the answer. I have preferred to rest the case upon the merits.

The complainants are entitled to the usual decree for a foreclosure and sale of the premises.

Wood v. Perry.

WOOD v. PERRY.

The complainants purchased of T. distinct portions in severalty, of a lot of land, by contracts, providing for their conveyance, at a future day. T. was in possession under a like contract from the defendant, who was seized of the land. Another contract had been given by the defendant to M. and he refused to convey to the complainants, except subject thereto. Thereupon one of them, W., in behalf of the whole, and for their protection, bought M.'s contract. The defendant then ejected the complainants severally, and they exhibited their bill against him, praying for an injunction and a conveyance of the land to W. for their benefit. *Held*, on demurrer, that there was no misjoinder of complainants, but that T. was a necessary party to the suit.

Auburn, October, 1843.

THE defendant in 1824, being seized of lot No. 37 in Galen, Wayne county, then wild and uncultivated, contracted to sell it to Royal Torrey, who thereupon entered into the possession of the lot, built a house and made other improvements. Torrey having paid but little towards the purchase money, and that irregularly, the defendant in 1834, executed a contract for the sale of the lot to one Mallory, who took possession. Mallory paid nothing on his purchase, and very soon after he entered, relinquished the possession to a tenant of Torrey's. In 1835, the defendant executed to Torrey who was then in possession, a new contract for the sale of the lot to him, the payments, to be made at a future day. He continued in possession, making a few small payments, but not in accordance with the terms of the contract, until he sold to the complainants.

In 1838, 1840 and 1841, Torrey contracted to sell distinct portions of the lot to the respective complainants in severalty, and they severally took possession of such portions. There still remained a portion of the lot unsold by Torrey, of which Wood, one of the complainants also took the charge and possession in behalf of Torrey. The defendant had assented to the contracts made by Torrey with the complainants respectively; but he still owned the lot in fee, and had received only a small part of its price.

The complainants continued in possession, making permanent improvements. In 1842, on their applying to the defendant to

Wood v. Perry.

have their respective parcels conveyed to them, on their paying the stipulated price ; he informed them that they must come in under the contract which he had given to Mallory, and he would not convey to them except subject to that contract.

It turned out that Mallory had assigned his agreement to one Leonard, the day after he gave up the possession to Torrey. On being refused a clear deed by the defendant, Wood looked up Mallory's contract, purchased it, and procured it to be assigned to himself, in order to protect all the complainants, himself included. He then tendered the amount due by the terms of that agreement, and demanded a deed of the lot. The defendant refused to execute the deed, and soon after commenced actions of ejectment against the several complainants. Whereupon they filed their bill stating the foregoing facts, and praying that the ejectments might be enjoined, and that the defendant should perform his contract with Mallory, and convey all the lands to Wood for their benefit. The defendant demurred to the bill, for want of equity, for the misjoinder of complainants, and because Torrey was not made a party.

L. Walker, for the defendant, in support of the demurrer.

W. H. Seward, for the complainants.

THE ASSISTANT VICE-CHANCELLOR.—If the bill rested upon the defendant's contract with Torrey alone, the objection of misjoinder of complainants would be fatal ; for there would be neither a joint or a common interest in the subject matter of the suit. But the Mallory contract, and the defendant's recognition of it and his reference to it as outstanding, have led to a different state of things. The purchase and transfer of that contract, having been made to Wood for the *protection*, and thus for the benefit of all the complainants, they have a common interest in enforcing it against the defendant, which will justify their uniting together in this bill. (See Story's Eq. Pl. 233, § 285. *The Attorney General v. Heelis*, 2 Sim. & St. 67.) The demurrer on the ground of misjoinder of parties, is therefore not well taken.

In regard to the omission to make Torrey a defendant in the

Rockwell v. Hobby.

suit, I do not perceive how the complainants are to proceed without bringing him in. Although as to the defendant, they may be entitled to insist upon the fulfilment of Mallory's contract, yet they entered into possession as purchasers from Torrey; and their statement shows that he has done nothing to forfeit his claims upon them. A conveyance of the whole premises from the defendant to Wood, under Mallory's contract, might overreach and cut off the rights of Torrey in the land. And in reference to the defendant's dealing with the land, it is proper, and perhaps he can claim, that the contract with Torrey should be disposed of in this litigation founded upon the other contract, inasmuch as the decree may deprive him of the power of conveying to Torrey. The demurrer for this cause must be allowed with costs. The complainants may amend their bill within twenty days, on payment of costs, and on their so doing, the injunction will be permitted to stand. If they omit to amend, the bill will be dismissed with costs, but without prejudice to the equitable rights of all or any of the complainants.

ROCKWELL & HOBBY, Executors, &c. v. HOBBY.

E. advanced money to one who held a bond and mortgage against his mother, H., paying its full amount. There was no assignment executed, the securities were lost, and it did not appear that they ever left the possession of their mutual attorney; but E. had the possession of H.'s deed for the premises mortgaged, and retained it till his death. It did not appear how he came by the deed.

Held, that the son had an equitable lien on the premises for the amount of his advance with interest.

If there had been no deposit of the deed, but he advanced the money on an agreement to have the mortgage assigned, equity would substitute him in the place of the mortgagee.

In the absence of other proof, evidence of an advance of money, and the finding of title deeds of the borrower in the possession of the lender, establishes an equitable mortgage.

February 9, 1844.

THE bill was filed by the executor and executrix of Ebenezer A. Hobby. It set forth that Harriet Hobby, the mother of

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Ebenezer, in 1822 bought a piece of land of one Hubbard, and a few days after, mortgaged the same to S. C. Barker. In 1827, she was sued on the bond, and her son, at her request, advanced the amount of the bond and mortgage. He did not take an assignment, but in order to secure him, she deposited with him Hubbard's deed of the land, (which was not recorded,) and he retained the deed until his death. The bond and mortgage cannot be found, and are lost. The bill prayed for a substitution in the place of the mortgage, also to have the benefit of the deposit of the deed as security, and for a sale of the lands to pay the advance made by E. A. Hobby.

The answer, without oath, insisted that the money paid by E. A. Hobby was the defendant's, and that the mortgage was paid off and destroyed. It denied that she deposited Hubbard's deed to secure E. A. H., for any money, and averred that he never had it in his possession to her knowledge.

The testimony established that E. A. Hobby paid the amount of the bond and mortgage, and the deed was in the possession of the complainants. Other facts will be found stated in the opinion of the court.

George Case, for the complainants.

J. Warren Tompkins, for Mrs. Hobby.

THE ASSISTANT VICE-CHANCELLOR.—There is no question but that the testator paid all the money with which Mrs. Hobby's bond and mortgage were satisfied to Barker or obtained from him. Mrs. H. alleges that they were paid with her own funds. Of this there is no proof, and the testimony corroborates the inference arising from its coming out of the testator's hands, that it was his money. Barker says that before suing the bond he applied to her for payment, and she answered that she had not the money. He told her he wanted her to procure it of some neighbor, and she said she would look it up. This shows not only that she had not the money, but that she expected to borrow it. We next find her son, after she has been sued, coming forward and paying it, and taking receipts which express that he

made the payments. I am satisfied from the evidence, that the money paid was his own.

The next question arises upon the possession of the bond and mortgage, and what became of them. That they are either lost or destroyed, we may assume from the statement in the answer. They doubtless passed from the possession of Barker's attorney, to that of Mr. Mead the attorney who appeared for Mrs. H. in the suit on the bond, and who made the payments to the attorney of Barker. Mr. Mead was probably the attorney in some measure, of the testator as well as of Mrs. Hobby. It appears he sent to the testator's counsel Mr. Grim, his bill of costs for the defence put in to the suit on the bond, to which is appended a charge for conveyancing done for the testator, and endorsed on the bill is a note to Mr. Grim, saying that he thinks the within bill should be paid before the assignment of the mortgage, &c., are given to Mrs. Hobby. This shows him acting for both.

At all events, we trace the possession of the bond and mortgage no further. Mr. Mead perhaps retained them for the payment of his bill, and the most probable conclusion as to their fate is, that they were burnt with his law papers many years ago.

The expression in his note in reference to the assignment of the mortgage, is a part of the *res gestæ*, and doubtless related to this transaction. And had the name been *Mr.* instead of *Mrs.* Hobby, or if it were after the death of the testator, I should have felt no difficulty in holding that there was to have been a transfer of the mortgage to the testator. As it is, the matter is involved in much obscurity. This testator may, for his mother, have done what is not usual, viz. advanced his money to take up a mortgage, without intending to keep it on foot as a security. His retaining the receipts is consistent with either supposition. If the case rested here, it would preponderate strongly in favor of his having in view an assignment, or at least retaining the security.

There is another transaction which may aid in solving the difficulty. The bill claims that on her son's making these advances, Mrs. H. deposited with him her deed of the mortgaged

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premises, then unrecorded, as security for such advances, and that it remained with him till his death, and the complainants have had it ever since. The answer denies the deposit, and says that Mrs. H. supposed that the deed was recorded, and that she had it in her own possession. The deed is produced by the complainants, and it has not been recorded. It does not appear when or how it came to the possession of the testator or of his representatives. Coming from the latter, we are to take it in the absence of explanation, that it was among the papers of the testator.

And in the absence of all other proof, the evidence of an advance of money and the finding of title deeds of the borrower in the possession of the lender, is held to establish an equitable mortgage. In *Ex parte Corning*, 9 Ves. 115, Lord Eldon says that the fact of the adverse possession of the deeds in the person claiming the lien and out of the other, was a fact, that entitled the court to give an interest.

In *Ex parte Wetherell*, 12 Ves. 401, the same Chancellor says, "it is very well settled, that if there has been a delivery of deeds, that, in this court, amounts to an equitable mortgage; and the possession of the deeds is, if no other purpose is shown, evidence of an agreement that the estate itself shall be a security."

In *Ex parte Haigh*, 12 id. 403, the evidence was, an application by one very much embarrassed, for assistance by discounting; after which application the lease was delivered. This was held sufficient to establish an equitable mortgage.

In *Ex parte Langton*, 17 Ves. 230, Lord Eldon said, "it has been long settled, that a mere deposit of title deeds upon an advance of money, without a word passing, gives an equitable lien."

Long before this, Lord Thurlow held in *Featherstone v. Fenwick*, 1 Bro. C. C. 279 n., and in *Harford v. Carpenter*, 1 id. 370 n., (see them stated by Lord Eldon in 14 Ves. 606;) that if there were a deposit of a lease, and nothing more passed at the time, that should be intended as a deposit for the sum then due. And see 2 Hovenden's Supplement to Vesey, Junior, 104, the note to *Ex parte Corning*, on the same subject.

Again, in *Kensington, Ex parte*, 2 V. & B. 79, 83, Lord

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Eldon says, "it has been so long settled that a mere deposit of deeds, without a single word passing, operates as an equitable mortgage, that whatever I might have thought originally, I must act upon that as settled law."

In the case before me, the deed went into the possession of the testator for some purpose. None is specifically proved; but there is an advance of money proved, an advance which went to discharge a mortgage given in truth for a part of the purchase money of the land described in that deed. The only inference is, that the deed was deposited as security for the advance.

In connection with the expression before adverted to, in Mr. Mead's note to Mr. Grim, it may be that the deed was left as security, while the advances were making from time to time, and with the expectation that when they were completed, and Barker paid off, the mortgage would be assigned. In this view the lien would be equally operative. The cases of *Wright, Ex parte*, 19 Ves. 258, per Lord Eldon, and *Hockley v. Bantock*, 1 Russell, 141, 145, show that an agreement to give a mortgage and delivery of the title deeds for the purpose of carrying it into effect, constitute a mortgage in equity, as against the person making the agreement.

The testimony of Dusenbury confirms the supposition that there was either an agreement that the mortgage should be assigned, which Mrs. Hobby supposed had been carried into effect, or an agreement that the deed should remain in the testator's hands as security. He testifies that she said she was willing the executrix should have the land, but she would rather the sale of it would be postponed until her youngest child became of age, and then the whole property could be sold to better advantage by being sold together. The evidence is that the land in question was bought by her to add to land which she previously owned. The conversation could not have referred to the testator's interest or that of his family, in the latter property, because it conceded the claim of the executrix to have the whole of the land spoken of. And as there is no other right or claim discoverable from the evidence, except that arising from the testator's advances to pay off the mortgage, the conversation must have referred to that subject. Upon the whole, my conclusion is that

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the advances were made upon the security of the property, and that the testator had an equitable lien for the amount. If the deed were deposited as security the lien is direct; and if there were an agreement to have the mortgage assigned, equity will treat it as having been done, in order to give it effect.

In either view, the statute of limitations is not applicable, and I need not examine whether the Revised Statutes apply to equitable demands existing when they went into operation.

There must be a decree for a sale of the premises, for the payment of the testator's advances with interest, and the complainants' costs.

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In an answer in equity, as well as in a plea in a suit at law founded upon a specialty, where the defence is usury, the terms of the agreement, and the quantum or rate of the usurious premium or interest, must be stated specifically; and the proof must come up to the statement in the pleading.

Proof of the plaintiff's admission that he had taken usury, will not support a plea setting forth a particular sum or rate per cent; nor will proof that he exacted a certain rate per cent sustain a plea alleging the taking of a sum in gross which does not correspond with the rate proved.

Where the answer charged that the mortgagee exacted \$112 50 for usury; and the testimony consisted of his admissions, that he had taken usury in the mortgage, also that the mortgagors paid him more than seven per cent, and that they paid him ten or twelve per cent; neither of which rates would produce the sum named; *held* that the proof did not support the answer.

Albany, January 18, 1844.

THE bill in this cause was filed to foreclose a mortgage for \$2900, executed by Edmund and William Phillips to the complainant, on the first day of September, 1840.

The defence set up by the mortgagors was that the mortgage was usurious. They filed a cross-bill to obtain a discovery of the facts alleged in their answer, but the answer of the mortgagee denied the allegations. The original and cross-suits were heard together, and so far as the pleadings and testimony were material to the points reported, they appear in the judgment of the court.

Rowe v. Phillips.

K. Miller and S. Stevens, for the complainant.

H. Hogeboom, for the defendants.

THE ASSISTANT VICE-CHANCELLOR.—The answer in the original suit alleges that “the bond and mortgage are illegal and void; that the same are usurious; and particularly and especially that the complainant Rowe, in stating and making up the pretended consideration thereof, included in such statement and computation, an item of \$112 50, pretended to be for that amount of cash furnished to the defendants or with which they were chargeable, by the complainant, on the day of the date of the mortgage.” The answer further alleges that “the said item is wholly fictitious and unfounded, and was inserted as a part of the consideration of said bond and mortgage by way of usury.” And the allegation is subsequently repeated that the “bond and mortgage are void for usury.”

The cross bill contains substantially the same charges, simplified as to the item of \$112 50, but containing no other specific charge of usury.

The general averment that the bond and mortgage are usurious, that they are void, &c., is unavailing. This defence cannot be proved under such an averment. In equity, as well as in a suit at law founded upon a specialty, the terms of the usurious contract, and the quantum of the usurious premium or interest, must be specified and set out distinctly, in the plea or answer; and the proof must come up to the statement in the pleading. (*Vroom v. Ditmars*, 4 Paige's R. 526, 533; *New Orleans Gas Light and Banking Company v. Dudley*, 8 *ibid.* 452, 458; *Crenshaw's Admin'r v. Clark*, 5 Leigh's Rep. (Va.) 69; *Smith v. Nicholas*, 8 *ibid.* 330.)

The defence to this bond and mortgage is therefore limited to establishing the usurious item of \$112 50.

The only witness who testifies in regard to this sum, is Mr. Esselstyne, the solicitor who prepared the bond and mortgage, and he says that in making up the statement of the sum for which the securities were to be given, the \$112 50 was inserted on an allegation of Rowe, that he had lent that amount to William

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Phillips in two or three sums, for which he had no note. William Phillips was not present, when the statement was prepared. Mr. Esselstyne says he asked Edward Phillips if the charge was right, but he did not seem to know whether it was or not; Rowe explained it to Edward, who then said he presumed it was right, although he did not know, it was a transaction between William and Rowe. Upon this Mr. Esselstyne entered the amount on the statement; and this is all that he knows on the subject. The evidence, so far, proves nothing against the justice of the \$112 50.

Other witnesses prove that Rowe said he had taken usury, or that there was usury in the mortgage; that the Phillips's paid him more than seven per cent; that they paid him ten, or twelve per cent interest; and as one witness says, five per cent, premium. Another witness speaks of a sum of ten dollars usury in a note of \$150, which went into the bond and mortgage.

It is not perhaps usual for usurers to make admissions, but one cannot on the testimony in this case, resist the conclusion that there was usury in the bond and mortgage.

The insuperable difficulty in the case is, that the proof does not support the usury set up in the answer. No one of the rates per cent mentioned by the witnesses, will produce an amount of usury corresponding with the \$112 50, even if it were assumed that the per centage spoken of was included in the bond and mortgage, as to which the testimony is quite obscure. Then proof of declarations that there was usury, that he had taken ten per cent, twelve per cent, &c., is not evidence that Rowe had included this \$112 50, in the mortgage. A general admission of taking usury, will not support a plea of a particular sum or rate per cent stated as constituting the usury; any more than proof of the admission of a party that he owed the plaintiff, would support a claim for any sum that the plaintiff might choose to insert in his declaration or bill of particulars.

The defence cannot be maintained on this evidence.

I have not alluded to the cross bill on this point, because Rowe was required to answer it on oath, and he has fully denied the alleged usury; thus making the case of the mortgagors much more difficult than it was upon the original bill and answer.

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The cross bill will have to be dismissed with costs ; and in the original suit the complainant is entitled to the usual decree.

M. J. HARDER and others v. J. J. HARDER and others.

A parol agreement, to leave lands to a person by will, though founded on a precedent valuable consideration, cannot be enforced in equity.

A resulting trust may be proved against persons claiming by descent, by parol admissions of the ancestor.

The intestate, in 1802, bought a farm, which was conveyed to him in fee, he giving a mortgage for the purchase money. He resided upon it until his death in 1835; but it was paid for out of the labor and earnings of his four younger sons. *Held*, that such payment raised a resulting trust in their favor, and that they were entitled to the farm in equity.

The youngest son, R. being the owner of ten acres of land, the intestate agreed with him by parol that if he would convey the same to his three brothers, he should have a small farm which the intestate owned in another town. R. conveyed the ten acres accordingly, went into possession of the small farm, and made permanent improvements upon it: *Held*, that the agreement was so far performed as to bind the intestate and his heirs.

Where the complainants have a legal title to a part of the lands as to which they ask relief against an ejectment, their bill as to such part, will be dismissed.

An objection to the bill for the misjoinder of complainants, will not be regarded, when it is raised for the first time at the final hearing of the cause.

Albany, January, 1844.

THE bill in this cause was filed to have the titles of the respective complainants in lands near the city of Hudson, declared and established ; and to restrain certain actions of ejectment brought by the defendants for their recovery. The facts are fully stated in the opinion of the court.

J. Gaul, Jr., for the complainants.

K. Miller, for the defendants.

THE ASSISTANT VICE-CHANCELLOR.—The leading facts in this case, as established by the testimony, are these. In 1802, John M. Harder, the father of the complainants, of John J. Harder

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and his two sisters who are defendants, was in the possession of a farm near Hudson, called the Roseboom farm, claiming it as owner. He was also the owner, by inheritance, of forty acres in Claverack. In that year, he bought another farm near the Roseboom property, called the Irish farm, and received a conveyance of it in fee subject to a mortgage. Within a few years after, John M. conveyed small parcels of this farm to the complainants Michael, Robert and Peter, and to John J., respectively.

In May, 1809, one Duncan recovered the Roseboom farm, except a small portion containing about ten acres, in a contested ejectment suit against John M. The case is reported in 4 Johns. R. 202.

The complainants Michael, Robert and Peter, in March, 1811, purchased from Duncan the farm so recovered, and took a conveyance of it to Peter. Peter subsequently conveyed an undivided third part to Robert, and another to Michael. In 1820, John M., the father, conveyed to the complainant Richard, who was his youngest son, the portion of the Roseboom farm not recovered by Duncan.

The legal title to the residue of the Irish farm remained in John M. Harder till his death in 1835.

To return to the year 1802. John M., the father, was then over sixty years of age. Michael was his eldest son, and was a married man. Robert was then about twenty-seven years old, and Peter was of full age. These three, who were called "*the boys*" till they were sixty or seventy years old, continued to reside with their father on these farms, though some of the time in different houses, until his death. The other complainant, Richard, was a boy in 1802. He also lived with his father, until shortly before the latter died. The defendant, John J., was brought up a blacksmith. He says in his answer, that he commenced business in 1804. "*The boys*" assisted him in erecting his buildings on the portion of the Irish farm conveyed to him.

Besides the five sons, John M. Harder had five daughters, who were brought up in his family, and married off with such portions as he deemed reasonable. He never worked any himself after his sons became old enough to labor. Witnesses who had known him from the time of the purchase of the Irish farm, say that he

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never worked a day. 'The Roseboom farm was never cultivated much until after it was bought anew from Duncan. "*The boys*" worked the farms and fished in the Hudson river. They earned a great part of their money by fishing.

John M. told one witness that when he bought the Irish farm, he had not five dollars in the world. Having no title to the Roseboom farm, this was literally true, if he owed the value of the small farm in Claverack. And there is no room to doubt that at the close of the Duncan law suit, he was not worth any thing. Witnesses who had good opportunities for knowing, testify that the Irish farm was paid for by "*the boys*;" amongst others their sister, Mrs. Son, who was the eldest of the family. The father himself declared this, time and again, during his life. His two daughters, who are defendants, have made the same assertion, and disclaimed an interest in the property. (Their statements are not inadmissible, because they are married. If they had answered, making the same admissions, the court would have made a decree upon their admissions.)

The family appeared to have lived in common, until after they were successively portioned off and established in life. The four complainants continued in common, until three of them became old men.

As to John J. Harder, he did the blacksmith work for the farms and the family for many years. On the other hand, he helped himself to grain and provisions from the farm, and was aided in various modes by the labor of "*the boys*" and their teams. Probably no charge was intended on either side. His father declared repeatedly, that John J. had received his part of the property; and he also stated that John J. had not helped to pay for the property. The proceeds of the Claverack farm went into the common stock. It does not appear that they were of much account. They were probably much less than went to the support and fitting out of the members of the family other than the complainants.

My conclusion upon the testimony is clear, that the Irish farm was paid for by the labor and resources of the three eldest complainants. That Richard aided in some degree; and that he bore his full share with the others, in the payment of the Roseboom farm;

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so that as between the complainants themselves, he is entitled to participate in whatever rights they may have in the aggregate property in controversy.

To resume the history of the case. When John M. Harder had become ninety years old, the complainants began to feel uneasy about the title to the residue of the Irish farm remaining in him, and requested him to convey to them. It seems that he determined not to part with the control of it while he lived. But in 1831, he procured a surveyor to mark out and divide the farm (about 82 acres) between Michael, Robert and Peter, equally, which was done accordingly, and stakes put down showing their respective bounds. This division included the share of Peter and the small parcel already conveyed to Robert. He also directed a will to be prepared, and executed it, devising the title accordingly; and at the same time giving the Claverack farm to Richard. He subsequently had a similar will drawn and executed, giving the latter to trustees for Richard and his family, in case he became incapable of managing it. In 1831, he declared that Richard was to convey his piece on the Roseboom farm to the other *boys*, and then was to have the Claverack farm. He afterwards said that Richard's wife's property was laid out on that farm, and by other proof it appears to have been laid out in building a barn and repairing the house. On the 19th May, 1832, Richard conveyed that part of the Roseboom farm to the other three complainants.

After John M. Harder's death, a great part of the family came together to have the will read, and it could not be found. Those present assented to take the statement of Mr. Rowley, who drew the will, and abide by his declaration of its contents. An instrument under seal to that effect, was drawn up and was signed at various times by all of the heirs except John J. Harder. Mr. Race, a defendant, signed it on condition that all should execute. Vossburgh and wife, also defendants, signed unconditionally, but on his getting possession of the paper two days after, he struck out the names of himself and his wife. Neither of the *feme coverts* who are now defendants, acknowledged its execution before any officer.

Mr. Rowley made a written statement of the contents of the

will, conformably to the sealed agreement; and showing the devises before mentioned.

In 1840, the defendants commenced actions of ejectment to recover the Roseboom, Claverack and Irish farms.

Before proceeding to the main questions, I will dispose of the minor points which were raised by the defendants.

1. As to the misjoinder of complainants; Richard Harder claiming the Claverack farm in severalty, and setting up no interest in the other property.

This objection, if it were well founded, is not available, because it is not insisted on in the answer.

2. The answer claims the same benefit as from a demurrer, to that part of the bill setting up the complainant's title to the Roseboom farm, on the ground that there was a sufficient remedy at law. This objection is well taken. Three of the complainants have the legal title to the whole of that farm, and have no need of the aid of this court in their defence to the ejectments for that portion of the estate in controversy.

In regard to the principal question, the right to the Irish farm.

Although the justice of the complainant's claim was clearly manifest at the hearing, I felt great difficulty in the principle on which they could be relieved. The bill founds no claim upon the will, as one existing at the death of John M. Harder. It rather proceeds upon the verbal contract to leave the lands to these parties by his will, as proved by Mr. Rowley, founded upon the consideration of their having paid for the property and their continuing to support him; and partly executed, by the division marked out by Rowley, taking possession in severalty according to it, and by Richard's conveyance of his parcel of the Roseboom farm.

There are great, if not insuperable obstacles, to sustaining this agreement. It is loose and indefinite in its terms; it is by parol, affecting the title to lands; and the part execution set up on the behalf of the three eldest complainants, was wholly between themselves and Richard Harder.

There is another ground on which the case may be placed in reference to the Irish farm. As I have already stated, the evidence is conclusive that the three eldest complainants paid for

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that farm. It is not probable that the decedent contributed in any manner to that payment. He received the legal title, but he held it as a *resulting trust* in favor of his sons who paid the consideration. 1 Cruise's Dig. 471, tit. Trust, ch. 1, § 31. *Boyd v. McLean*, 1 J. C. R. 582.

It is very true that the declarations of the father in his lifetime, are not the kind of evidence by which the title to real estate is to be divested or destroyed. But for any purpose for which parol evidence is competent, his declarations are admissible against the defendants and others claiming under him by descent. A resulting trust may be proved by parol. The statute of frauds expressly excepted trusts arising or resulting by implication of law. I shall therefore hold that the three eldest complainants were equitably seised in fee of the Irish farm, with a claim upon them in favor of Richard, growing out of his contributions to the common stock, which went principally into the payments for the Duncan purchase.

Then it remains to speak of the small farm at Claverack. The allegation in the bill, on this subject, is substantially proved. One witness says that when the decedent was speaking of his plan of dividing the Irish farm among "*the boys*," he said that Richard was to give up the deed of the ten acres by the river to "*the boys*," or give them a new deed of it, and then he was to have the land in Claverack.

Another witness testifies that the decedent said he wanted Richard to give up that deed to the rest of the boys, and then he should have the old place in Claverack.

It is fairly established that the decedent in consideration of Richard's conveying the ten acres to the other three complainants, agreed with him to give or grant to him the Claverack land. It is probable that Richard's contributions to the payment for the Roseboom farm, and to the general support of the family, were inducements with his father for this arrangement. But that does not impair the force of the allegation in the bill. It is not shown that the agreement was inadequate, provided it rests only on the conveyance of the ten acres.

Richard conveyed the ten acres to the other complainants, went into possession of the forty acres in Claverack, laid out his wife's

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property in permanent improvements there, and has remained in possession until this suit was brought. The agreement is so far performed as to take it out of the statute of frauds. The decedent became a trustee of the legal estate, and Richard was equitably seised.

On these grounds, I think he is entitled to be quieted in his title to the forty acres, against the claims of the defendants.

It is unnecessary for me to determine the points raised upon the agreement signed by all the defendants except John J. Har-der.

The defendants will be perpetually enjoined from prosecuting the ejectment suits against the Irish farm and the Claverack property; and will be decreed to release the same to the respective complainants.

The bill is not sustained as to the Roseboom premises, on the ground already stated. For this cause, without referring to other considerations, the complainants must bear their own costs of suit.

BOISGERARD v. THE NEW YORK BANKING COMPANY.

An association organized under the act to authorize banking, contracted in the name of its president describing him as such. *Held*, the identity being clear that the contract was valid.

A variance in the use of the name of one of these associations does not vitiate its contracts. In this respect they are governed by the same rules as corporations at common law.

The bank obtained a loan of money on a sealed agreement, which, as it was contended, was illegal because the cashier did not sign it, according to the provision of that act. The bank had no cashier at the time. *Held*, that the lender might recover the money loaned, whether the agreement were defectively executed or not. *Semb.* that its execution was sufficient.

Such banking associations, are within the provisions of the revised statutes relative to proceedings against corporations in equity; and on their failing to comply with the act of 1841 regulating their annual returns, they are liable to be treated as insolvent corporations under those provisions.

May 9, 1844.

Boisgerard v. The New York Banking Company.

THE bill was filed by Edward Boisgerard against John Delafield, President of The New York Banking Company, and other defendants. It stated that the New York Banking Company was an association formed in November, 1838, under the provisions of the act to authorize the business of banking, passed April 13th, 1838. The bill then set forth various transactions, by means of which the complainant became a creditor of the banking company to a large amount, on which there was still due to him about \$75,000. That the company was insolvent, and that in the annual return of its condition and affairs made to the Comptroller in January, 1842, it violated the directions of the statute regulating such returns.

The bill prayed for an injunction and the appointment of a receiver, and that the company might be wound up as an insolvent corporation, and its funds applied to the payment of its debts, according to the provisions of the Revised Statutes. An injunction was issued, and a receiver subsequently appointed. The bank, by its president, answered the bill, and the cause came on to be heard upon pleadings and proofs. The opinion of the court states all the additional facts which are requisite for elucidating the points decided.

F. B. Cutting, for the complainant.

E. S. Van Winkle, for the defendant.

THE ASSISTANT VICE-CHANCELLOR.—The validity of the complainant's debt is disputed on several grounds.

I. It is said that the sealed agreement set forth in the bill, is not made with the bank by its name of contract. The name of the institution is "The New York Banking Company," and the contract is made in the name of "John Delafield, President of the New York Banking Company."

The sixteenth section of the original act creating these associations, requires the certificate which is to be filed as a part of their organization, to specify "the name assumed to distinguish such association, *and to be used in its dealings.*" But the statute does not declare that a variance in the use of the name

thus assumed shall invalidate its contracts. Such a provision would have been as repugnant to common sense, as it is to the principles of law applicable to all corporations. (See Angell & Ames on Corp. 122, 169, 171, and the cases cited.) There is no doubt of the identity of the association described in this contract, and the misnomer therefore does not vitiate the transaction.

2. It is next objected that the contract is not signed by the cashier of the bank. This is true, and it is proved that the bank had no cashier until long after this period. There was an assistant cashier, but his execution of the instrument would have been met by a similar objection. The act before mentioned, (which in accordance with popular usage, I will hereafter call *the general banking law*,) provides that "contracts made by any such association, and all notes and bills by them issued and put in circulation as money, shall be signed by the president or vice president *and cashier* thereof." It is evident that this provision cannot receive a literal interpretation. It must be construed reasonably, and with reference to the objects in view, of which the principal one was the circulation of bank notes. There are many implied contracts which necessarily arise in the transaction of banking business, which of course could not be evidenced by the signature of any officer of the bank. So it is idle to suppose that such express contracts, as the supply of fuel, stationery, &c., for the banking house of one of these associations, were to be reduced to writing and authenticated by the president and cashier.

Probably the utmost latitude of construction would limit the provision of the law to such express contracts as were necessarily or as a matter of expediency, made in writing. I am however relieved from pursuing the inquiry, and deciding whether the omission of the signature of the cashier in this instance, rendered the agreement nugatory, by my conclusion upon the next point discussed.

I think that the complainant is entitled to recover his money, whether the agreement was or was not so executed as to be binding upon the company.

3. This brings me to the objection that the contract for the advances to the defendants was *illegal*, because the agreement

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was defectively executed ; and that being illegal, the complainant cannot recover back his advances.

It by no means follows that the contract is illegal, because it is invalid. A deed without a seal would be invalid, yet that would be no answer to an action to recover the consideration paid. In the instance of the insurance companies, where their charters require policies to be attested in a particular mode, if a policy should happen to be defectively attested so as to be utterly worthless to the insured, I do not think that the requirement in the charters would be any answer to a suit to recover back the premium paid.

There is nothing in the general banking law, which requires a contract of the bank for a loan of money to be made in writing. This bank attempted to contract for a loan by a written instrument ; and they received the loan. Assume that the instrument itself was totally inoperative. Is the bank therefore to keep the money ? It is more reasonable to hold that the contract of loan stands precisely as it would have done if no writing had been made. The defective instrument is as no instrument. It is a nullity, which may be laid out of view ; and we then have simply an advance of money, and an implied promise to repay it.

To test farther the argument that the contract is illegal because not signed by the cashier, let us suppose it to have been a contract for the sale of a lease which this bank had acquired, and that the complainant had paid the whole price. It must be conceded, that if the cashier's signature were indispensable, the complainant, could not enforce such a contract by a bill for specific performance, or by an action at law for damages. The reason is that the contract is defective ; it is invalid ; it does not conform to the mode by which alone the bank can legally bind itself to sell land. It is equally clear to my mind, that the complainant could thereupon recover the purchase money, in an action for money had and received. This would not be *rescinding* the contract, because that expression implies a contract which was once valid and in force. It would be recovering back money paid on a consideration which failed, and which good conscience requires should be restored to him.

The cases referred to by the defendant's counsel, were those of

agreements founded upon, or intended to effect, some design or operation prohibited by law. They came within the well defined principle that contracts founded upon an unlawful act, cannot be enforced by action. They have no application to a contract lawful in its objects, but defectively executed; or which, made for some legitimate purpose, was inoperative and null for informality.

4. It is farther objected to the complainant's debt, that the loan was made to the bank for an illegal object, viz. the cotton speculation of the bank with the Hernando Rail Road Company. The defendant's contract with the rail road company was made April 3d, 1839; the contract in question bears date June 15th, 1839. The complainant's loan was made to the defendants, and was distinct and independent from that of the defendants to the rail road company. He had no right to direct, or even to inquire, what disposition the defendants made of his money. He was to be reimbursed by the proceeds of cotton, which the rail road company were to consign to the defendants. Whether for a cotemporary loan to the rail road company or for an existing debt, the contract between these parties does not disclose. There was nothing in the agreement between the complainant and the bank, which gave notice to the former that the operation of the bank with the rail road company was unauthorized or illegal. The transaction is the same as if the complainant had advanced to the bank \$50,000, and as security for its re-payment received a transfer of a bill of lading of a thousand bales of cotton shipped to the bank by some corporation in New Orleans. If the defendant's transactions with the Hernando Company were as illegal and unjustifiable as their counsel argues that they were, I must acquit the complainant of all participation in their guilt.

I have not adverted to the testimony in support of the debt. There was no question made as to its amount; nor any as to its existence, save those which I have examined. The complainant has established his claim as a creditor of the association.

His form of proceeding is the next subject of inquiry.

A receiver has been appointed on his application in this suit, by the Vice-Chancellor; and the motion was litigated by the defendants. The decision of the Vice-Chancellor, perhaps war-

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rants my omission of farther investigation. I will nevertheless, briefly state my views on the point involved.

I consider it well settled that the associations created under the general banking law, are corporations. The Revised Statutes provided the form of proceeding adopted in this case, upon the application of any creditor, whenever a banking corporation should become insolvent or unable to pay its debts, or should have violated any of the provisions of its charter or of any statute binding upon it; (2 R. S. 463, 4, § 39 to 41.) In 1841, the legislature prescribed the contents of an annual return to be made by each banking association under the general law, and declared that any one of them that should fail in making such return, might be proceeded against and dissolved as *an insolvent association*. (Laws of 1841, ch. 319, § 1 to 3.)

There is but little doubt that the New York Banking Company was insolvent when this bill was filed. There is no doubt but that it had incurred the penalty of the act of 1841, by its omission to make the required return of its condition and affairs in January, 1842. It was contended in their behalf, that the words "insolvent association" in the third section of the statute of 1841, restricts the application of the penal consequences of this default, to the mode pointed out in that statute. But the act gives no mode of proceeding whatever. It does not even provide the tribunal in which it is to be instituted. It is wholly nugatory, a dead letter, except by reference to other provisions of law. I think there is no difficulty in finding the provisions which were intended to apply. As "an insolvent association," it is a corporation directly within the letter of the Revised Statutes already referred to. And I understand that this construction has been given to the act of 1841, by the Chancellor.

The objection that the complainant has a remedy at law, is not stated in the answer in a manner which authorizes the point to be raised here. If it had been fully stated, it would have been inapplicable to the principal objects of this suit.

My conclusion is that the complainant is entitled to a decree for winding up the corporation, and distributing its assets among the creditors, in the mode prescribed by the Revised Statutes.

FITCH and others v. COTHEAL.

The wife of J. W. being seised of lands, joined him in executing three several mortgages to secure his bonds for money lent. Before his death, his attorney, with means furnished by him, paid the mortgagees, and took an assignment of the bonds and mortgages, to S., who soon after gave J. W. a certificate that he held them in trust for J. W. and subject to his order and control.

Held, that J. W. was the principal debtor, and his wife's lands stood in the relation of a surety for his debt. And that after the assignment and certificate, the securities belonged to him in equity, and the lands were thereby discharged from the lien of the mortgages.

Held also, that one who subsequently purchased the mortgages of S. in good faith and without notice, could not enforce them against the widow of J. W. and her heirs.

Such purchaser exempted from costs, after an unsuccessful defence.

May 15, 1844.

THE bill in this cause was filed to restrain the sale of three lots in Brooklyn, which were advertised by the defendant Cotheal, under the powers of sale contained in three several mortgages executed thereon by John Webster and Lydia his wife.

It appeared that the wife of Webster was seised of the lots in fee, that she died intestate and without issue on the 24th of May, 1832, and that the complainants are her heirs at law.

On the 8th of May, 1832, John Webster borrowed \$1200 of one Bergen, \$600 of J. Wyckoff's administrators, and \$1000 of W. Ellsworth; to secure which sums he gave his bond to the respective lenders, and he and his wife executed a mortgage to each, conveying to each lender one of the lots, as a security for their respective loans.

On the 7th of June, 1833, Bergen on receiving the sum due on his bond and mortgage, assigned the same to S. W.; and on the 15th of June, 1833, the other mortgagees being paid the sums due to them respectively, assigned to S. W. the other two bonds and mortgages. S. W. professed to hold them as the trustee for his brother N. W., who was Webster's attorney and legal adviser. The testimony established that N. W. paid the mortgagees, but that more than \$2900 of the amount was furnished to him by Webster about the same date, and that he re-

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ceived the residue, \$49 11, from or in behalf of Webster, within two months thereafter. On the 15th of October, 1833, S. W. signed and delivered to Webster a writing drawn up by N. W., certifying that he held the three mortgages in trust for Webster and subject to his order and control.

The bonds and mortgages remained in the possession of S. and N. W., and were subsequently assigned by S. W. according to N. W.'s directions, to different persons, as valid, and subsisting securities; and in March, 1839, they were purchased by Cotheal, who paid nearly the amount appearing to be due upon them, and received assignments of them, without any direct notice of the equities of the heirs. He then proceeded to foreclose the mortgages by an advertisement under the statute. Some other particulars will be found in the decision.

H. Wilson and W. Silliman, for the complainants.

J. Slosson, for the defendant Cotheal.

THE ASSISTANT VICE-CHANCELLOR.—S. W. became the assignee of the three bonds and mortgages in question in June, 1833, and did not part with the title of either of them until November, 1834. On the 15th day of October, 1833, he executed a certificate to Webster, the mortgagor, declaring that he held the mortgages in trust for Webster and subject to his order and control. The mortgages therefore belonged in equity, to John Webster in October, 1833. The lands mortgaged were the estate of his wife. His interest in them terminated upon her death in May, 1832, and they descended to her heirs. As between Webster and her heirs, in October, 1833, he was the principal debtor in respect of these mortgages, and the lands mortgaged stood in the relation of his surety. When therefore Webster became the equitable owner of the mortgages, the lands were discharged from the lien. As the principal debtor, he could not purchase the obligation, and then collect it of his own surety.

This is the aspect of the case, whether S. W. be deemed the assignee for his own benefit, or a trustee for N. W. The dec-

laration of trust to Webster was drawn by N. W., who thus assented to its truth.

If I am to consider S. W. as having acted throughout, for and under the direction of N. W.; (and such appears to be the effect of the testimony ;) the case is still stronger to show that the lien of the mortgages was extinguished in 1833.

The mortgages all became due on the 8th day of May, 1833. The assignment of Bergen's mortgago to S. W., is dated June 7th, was proved June 10th, and recorded June 23d, 1833. The other two assignments to S. W. are dated June 15th, were proved June 17th, and recorded June 22d, 1833.

By the account rendered by N. W. to John Webster, which is competent testimony on the assumption that the mortgages were assigned to S. W. for N. W.'s use and benefit ; it appears that the three mortgages were all charged by N. W. to Webster, as having been paid on the same day, viz : June 10th, 1833. It is not probable that he paid the two mortgages to Wyckoff's executors and W. Ellsworth before the date of the assignments of the same. It is much more probable that Bergen executed the assignment of his mortgage and left it in escrow with the then partner of N. W. and who proved its execution, to be delivered when the money was paid. By the amounts paid, it would seem that interest was paid to Bergen to the 8th of June, and to Wyckoff's executors to the 15th of June. As the account rendered to Webster enters them as having all been paid at once, my conclusion on the whole is, that they were paid on the 15th day of June.

By the same account, N. W. credits Webster June 14, 1833, with "*net proceeds of note for \$2975,*" the sum of \$2904 76. The whole amount paid for the three mortgages was \$2953 87, as shown by the same paper. . Then on the 25th of June, 1833, N. W. received \$47 06, of rent for Webster, which with the proceeds of the note, leaves a deficiency of only \$2 05, in paying the mortgages. Continuing the account between Webster and N. W. to the date of Stephen W.'s declaration of trust, N. W. received \$54 for rent, August 10, and on the 11th of September, he paid out \$10 30 for insurance. So that at the date of the declaration, he appears by this account to have been indebted to

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Webster, and the mortgages paid off. Then comes the execution of the declaration of trust, drawn up by N. W. and signed by S. W., and which is utterly inconsistent with the idea that either of them then had a particle of interest in the mortgages.

This evidence leads me irresistibly to the conclusion, that Webster's note was made for the purpose of raising money to procure these mortgages for his benefit. That they were transferred to S. W. the better to subserve that purpose, and to prevent a merger. And that S. W. delivered the declaration of trust, as soon as N. W. was fully paid the trifling advance which he made to obtain the assignments.

Without further detail, it is clear that the mortgages were equitably discharged, as early as October, 1833, and the heirs of Lydia Webster who owned the land, were then entitled to have them given up and cancelled. This was an equity which no subsequent sale of the mortgages, even to a *bona fide* purchaser for full value and without notice, could divest or overcome. And whatever may be the hardship of the case in reference to Mr. Cotheal, it must prevail against the title which he acquired as assignee of the mortgages.

This conclusion renders it needless for me to examine at large the question whether Mr. Cotheal had notice of the mortgages being paid, either actual or constructive.

So far as it has a bearing upon the decision as to costs, it appears to me that although he should have had his suspicion excited by some of the circumstances attending these securities, and that he did not act discreetly in purchasing them; yet there is no proof that he was actually aware of the truth, or that he was guilty of any bad faith in the transaction.

N. and S. W. stand in a different position before the court, and they must bear the consequences of the wrongful sale of these extinguished mortgages.

The complainants are entitled to have the mortgages delivered up and cancelled of record, and the defendants S. and N. W. must pay their costs of suit.

ORDRONAUX v. REY.

By a marriage contract executed in France by parties domiciled there, on the eve of their marriage, the wife under the provisions of the French law, put one-third of her fortune into *community*; and excluded the residue therefrom, which residue was to belong to her and be re-taken by her. The parties removed to New York, and the husband died there twenty years afterwards. He had taken and used in his business, the whole residue of his wife's property, as well as that of the community. At his death, he was in equity seized of and entitled to real estate in New York.

On a bill filed by his widow, claiming that the marriage settlement operated as a *mortgage* on his whole estate, and that she was entitled to priority of payment of all her demands arising under the settlement,

- Held*, 1. That according to the laws of France, if the parties had remained there, she would have had no preference over other creditors of the husband in respect of his movables, nor any lien by way of *privilege* over his immovables. She would have had a *mortgage* upon his immovables.
2. That although the courts here, construing the settlement according to the *lex loci contractus*, will give to her the same rights as a creditor, that the French law would confer; they cannot and ought not to yield to her over real estate situated here, a lien or priority unknown and repugnant to the laws and regulations of the country *rei sitæ*.
3. Creditors here are entitled to rely upon those laws for the administration of their debtor's estates.
4. The French Civil Code refuses to contracts made in a foreign country, the force of a mortgage in France; and international comity does not require us to pursue a different course.
5. That therefore the complainant, whatever was the extent of her rights as a creditor by reason of the contract of marriage, had no lien upon her husband's estate, nor priority over his other creditors.

August 2, 1844.

THE bill in this cause was filed on the 11th day of May, 1842, by Elizabeth Ordronaux, the widow of John Ordronaux, deceased. It set forth the marriage of those parties at Paris in the kingdom of France on the 13th of September, 1815; and that on the 1st day of September, 1815, in contemplation of that event, they entered into marriage articles or a settlement, before two notaries at Paris, in conformity to the laws of France. Both parties were natives of France, and were then residing there, though the husband was a sea-captain, residing usually at New

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York. The first article of the settlement provided that the betrothed lady and gentleman would hold in common property they might acquire, according to the provisions of the French Civil Code, by which Code their community should be managed, regulated and divided, in whatever country they might subsequently reside or acquire property.

By the second article, they agreed that each should pay their respective debts contracted before marriage, and the same should not be a charge either upon the property of the other party, or on that of the community. The third article declared that the future husband brought to the marriage and constituted as his portion, 300,000 francs, viz. 298,000 in cash, and 2000 in the value of his clothing, &c. in use, which amount the future wife thereby acknowledged.

The fourth article declared that she brought to the marriage as her portion, 300,000 francs, viz. 294,000 in cash, and 6000 in the value of her clothes, laces, jewels and diamonds, &c. in her use; and the future husband thereby consented to be charged with the amount of such dowry.

The fifth to the eighth articles were as follows:

"*Article Fifth.* Of the said property each party shall contribute to the community heretofore established, the sum of one hundred thousand francs, which will make a fund of two hundred thousand francs; and the surplus of the said portions together with what may subsequently come to each of the couple in personal or real property, by inheritance, gift, bequest, or otherwise, shall be excluded from the said community and belong to that one of the two who is entitled to the same, and be re-taken, besides his or her share, by him or his heirs or representatives.

"*Article Sixth.* The survivor of the future husband and wife, shall have and take as a *preciput* and before the division of the personal property of the said community, such articles as she may select, to the amount of sixty thousand francs, according to the appraisement in the inventory which shall then be made, or may take that sum in money at the election of the said survivor. The amount of the said *preciput* is not to be deducted from the gift hereinafter made.

"*Article Seventh.* If during the marriage, any inheritance or

rents belonging to either of the said parties separately should be sold, or the said rents should be re-purchased, the money arising therefrom shall be re-invested in the purchase of other real estate or rents, which shall belong to the party whose property was sold, and to his or her heirs and representatives—however, if the said re-investment should not be made on the day of the dissolution of the said community, it shall be made in the property thereof, and should that not be sufficient for the re-investment of the funds of the future wife, she shall have them invested in the individual property of the husband. The action for which re-investment shall be deemed a real action, and shall be the individual property of the party who shall be entitled to institute it, and his or her heirs and representatives.

“Article Eighth. The future wife and the children to be born of the marriage, shall have the right by renouncing the community at the time of its dissolution, should this community prove more onerous than profitable, to retake the whole amount of the portion brought by the said wife as herein before mentioned, together with whatever may have been acquired by her, during the continuance of the said community, in personal or real property, by inheritance, gift, bequest or otherwise, and should the wife herself make this renunciation she shall retake in addition to the *preciput* hereinbefore agreed upon, the whole to be taken free and clear of the debts and mortgages due by the said community, even though it should be charged with or sentenced to the payment thereof, in which case the wife and her children shall be discharged therefrom, and secured and indemnified therefor by the husband, and out of his *personal* or *individual* property which is legally mortgaged for the entire fulfilment of the clauses and stipulations of this contract.”

By the ninth article, each party made a gift to the other in case of survivorship, of all the property of the one who should first die; to be held by the survivor as a usufructuary for life, but without giving security or investing, and merely on giving a receipt and an inventory. In case there should be one or more children of the marriage living when the gift opened, then it should be reduced to one-fourth in full and entire ownership, and another fourth for life only to be held as before mentioned.

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By the tenth and last article, each party reserved the right of taking 50,000 francs from the gift stipulated in article ninth, to be disposed of by a last will and testament.

The bill further stated that the parties resided in France till 1818, when contrary to the complainant's wishes, they removed to the city of New York. There were several children of the marriage. That her husband converted all her property and the joint property to his own purposes, without her consent, and made investments in the names of others, to defraud her of her rights under the settlement. That for this purpose, he purchased in 1837, lot 24 Leonard-street in this city for \$4000, and took the title thereof in the name of John B. Rey, who knew of his object in so doing. That in 1839, Ordronaux left the United States and died abroad in 1841, leaving a will made in 1827 of which his wife was the executrix, and by which he bestowed all his property as if he had died intestate. That all his estate was insufficient to make good to her the 300,000 francs which she brought to the marriage, or even the 200,000 which she kept for herself out of the community, and that she has other claims also growing out of the marriage articles. That she renounced the community after his death, by a proper instrument filed with the Surrogate in New York.

That Rey admits he has no interest in the lot in Leonard-street, except as trustee for John Ordronaux the son of the complainant and her deceased husband.

The bill prayed for an account by Rey, and that the title of the house and lot be conveyed to the complainant.

She subsequently filed a supplemental bill making Chastellain and Ponvert defendants, as lessees of the premises under Rey, who were indebted for rents accrued. Her son John was also made a party to this bill.

The answer of Rey admitted the principal matters stated in the bill. He alleged that the title of the house and lot was vested in him by Ordronaux, in trust for his son John. That he and the complainant lived unhappily, and were separated many years before his death. That he made the lease, and managed the premises himself till he left the country, and the rents have since accumulated, so far as they have been paid. Rey traversed the

complainant's right and claim in all its parts ; and he also set up as a bar, the statute against fraudulent conveyances.

Chastellain and Pouvert also denied her rights in their answer. They admitted the purchase of the house and lot by Ordronaux in Rey's name, and claimed the same under a lease for seven years from May 1, 1838, at \$550 annually. That on the 1st of August, 1842, there was unpaid \$1198 44 of rent, against which they claimed to set off a note they held against Ordronaux for \$1830 41, dated in 1835. That Rey had distrained for the rent, and they had brought replevin for the goods seized, which action was still pending.

The marriage contract and articles were proved by testimony taken in Paris on a commission, and the Code Napoleon was made evidence by a stipulation. It was also proved that \$60,000 was paid to John Ordronaux from the maternal estate of the complainant in June, 1815, in anticipation of the marriage.

The statements in the answers were substantially proved ; and it was conceded that Ordronaux died insolvent if the complainant were a creditor for the 200,000 francs.

W. Curtis Noyes, for the complainant, made the following points.

I. By the contract of marriage and the laws of France which it adopts to the exclusion of all others, the plaintiff became and was at the death of her husband, and after the renunciation set forth in the bill, a preferred creditor to the amount of the original sum brought by her to the marriage, being 300,000 francs, (under article 8th,) and to the 60,000 francs, provided for in article 4th, together with her accumulations ; and also to *one-fourth* of all his estate in absolute ownership, and to another *fourth* for life, under article *ninth*. (Code Napoleon, Civil, articles 1421, 1081 to 1090, 1441, 1442, 1453 to 1459, 1492 to 1495, 1503, 1514, 1515, 1525, 1597 ; *Le Breton v. Miles*, 8 Paige, 261 ; *Decouche v. Savetier*, 3 J. C. R. 190 ; Clancy's Rights of Women, 494, chap. 4.)

II. To secure to her these sums, and the other provisions of the marriage contract the whole estate was "*legally mortgaged*" to her by the concluding part of the ninth article of the mar-

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riage contract. (*Churchman v. Harvey*, Ambler, 340; 2 Des-saus. 299, 552; 2 Hill's Rep. So. Car. 423.)

III. For the sums thus due her, and for which the estate of Mr. Ordronaux was then mortgaged, she had a valid lien upon the property conveyed to the defendant Rey in 1837, and to the rents and profits thereof. These premises were purchased by the husband, paid for with his funds, and occupied by or under him during the time he remained in the country after the purchase was made:

1. If there was no resulting trust in his favor arising from the fact that he paid the whole purchase money, still a trust resulted to the complainant as his chief creditor under the marriage contract, and therefore to pursue the property in the hands of all but *bona fide* purchasers. (1 R. S. 728, §§ 51, 52.)

2. The statute of frauds (2 R. S. 134, § 6,) referred to by Rey as a bar to complainant's claim upon the property, does not affect her rights, inasmuch as they are fully protected by the provisions in regard to trusts above referred to, and by the general principles of the common law in regard to fraudulent conveyances.

3. The provisions of all these statutes combined, and the fact that there was no written declaration of trust in favor of John Ordronaux, Jr., show that Rey's claim to hold in trust for him, is utterly unfounded. Such a trust by parol cannot be sustained, nor could it be upheld even if in writing and duly executed, against the complainant's paramount equity; as the supposed *cestui que trust* was in no sense a *bona fide* purchaser, and stands in the relation of a mere voluntary donee without consideration.

IV. The defendant Rey should therefore be decreed to convey the premises in question to the complainant and to account for all the rents and profits received by him, and which have not been paid over prior to notice of the complainant's equity.

V. The defendants Chastellain and Ponvert should also be decreed to account for the rents of the premises due from them, and this without any deduction on account of the note they hold against John Ordronaux.

1. They became assignees of the lease after the note had been given, and consented to hold under Rey as lessor, and then be-

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came liable to him for the rent, without any right to deduct from it or set off the amount of the note.

2. They gave no credit to John Ordronaux on the strength of the lease, or of the demised premises, or of the rent. It was a simple contract debt on the personal credit of the debtor alone, created long before he owned the property.

3. The complainant's equity is not only prior in time, but also prior in right, and must prevail over the claim of every person other than a *bona fide* purchaser having actually paid the purchase money. None of the defendants, nor any person for whom they claim, stand in that relation.

C. W. Sandford, for the defendants, Chastellain and Ponvert, cited the Civil Code of Napoleon, articles 1456, 1457, 1402, 1409, 1410, 1412, 1419, 1421, 1482, 1492, 1494; 2 Rev. Stat. 354, subd. 10.

H. B. Cowles, for the defendants, J. B. Rey and J. Ordronaux, Jr.

THE ASSISTANT VICE-CHANCELLOR.—The real estate in controversy was purchased by John Ordronaux with his own funds. It is not claimed that the property which belonged to the complainant on her marriage with him, or that which she and her husband put into *community* at that time, can be traced down to the purchase of this estate. But the ground of the bill is, that the property in question actually belongs to the complainant, or at least that she has a paramount lien upon it, because her husband did not leave enough property of all kinds, to discharge her just claims under their marriage settlement. These claims consist of her separate property of 194,000 francs, which it is said he converted to his own use, and of her portion of 100,000 francs which she brought into the *community*, and of her right to 60,000 francs out of the community as a *pre-ciput* in pursuance of article sixth of the settlement. And she insists, that by the contract of marriage and the laws of France which it adopts, she is a preferred creditor of her husband for all these claims.

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It cannot be contended that there is a specific lien on this property, or any thing in the nature of a direct equitable lien. The clause in article 8th of the contract "*legally mortgaging*" the future husband's individual property, it appears to me cannot reach across the Atlantic and effect a lien upon land bought by him more than twenty years afterwards. Its effect is hereafter explained.

The case rests solely upon the claim of a lien by force of the contract, the covenants therein, and the laws of France which it adopts.

The provisions of the French Civil Code on this subject, are so wholly different from the rules of law to which I am accustomed, that I feel no certainty that I have been able to understand them, or to trace their connection with the law of debtor and creditor in France, which bears upon this question.

Proceeding therefore with some distrust as to their accuracy, I will state my conclusions.

The property in question was the fruits either of the *community* established by the marriage contract, or was John Ordranax's sole property. Article 1402 of the *Code Civil*, declares that every immovable is reputed to have been acquired in community, unless it be proved that one of the married parties had it before the marriage, or that it has fallen to such party since by title of succession or donation.

Whether this property were of the community or of the husband, it would, if in France, be liable for the debts which he had contracted. An action results against the community for all debts contracted by the husband during its continuance. (*Code Civil*, article 1409, subd. 2.) The compact of these parties in article 2d of their contract of marriage does not affect third persons. It merely relieves the community as between themselves.

As to the rights of the wife against her husband. He has the management of all the personal property of the wife, but cannot alienate her immovables without her consent. He is responsible for all waste in her personal goods occasioned by the neglect of conservatory acts. For the price of her immovables she is entitled to recompense out of his goods, in case of insuffi-

ciency in the goods of the community. And she may in like manner exercise her claims in general. (Code, Articles 1428, 1436, 1472.)

It is claimed here that the complainant has renounced the community in due form. This is disputed, but I will assume for the present, that it is proved. In such case she forfeits every description of claim upon the property of the community; but she has a right to resume, 1st, her immovables; 2d, the price of her immovables alienated; and 3d, all indemnities which may be due to her from the community, and she may exercise all actions for these and previous demands, against the property of the community, as also against the property of her husband. (Articles 1492, 3, 1495, and see 1514.) By these and other provisions of the Code, I understand that the wife has a right to indemnity, for her separate property converted by her husband during the marriage; and where it is so stipulated, for her contribution to the community; and that she can *exercise an action* therefor against the property of the community, and the separate property of her husband. But I do not understand that she can *exercise an action* against his separate property for any part of the *preciput*, or conventional reversion, stipulated in the marriage contract. For this she can only look to the distributable mass of the community. (Article 1515.)

Nor do I learn from these provisions that the wife has either by the law of France or by the compact, any lien, or priority over other creditors, for her claims against the community, or against his separate estate. And it would certainly be carrying our regard for these foreign contracts to an extraordinary and alarming extent, if the wife of a Frenchman, married in France, but domiciled and doing business here for twenty years, should be permitted upon his death, to retain all his estate real and personal to the entire exclusion of *bona fide* creditors, upon the stipulations of a marriage contract, registered in some city in France but wholly unknown to those dealing with him here on the faith of his apparent property. And on the claim set up in this suit, I do not perceive why the goods obtained by a French merchant trading here, from an importer on credit, might not, as well as other property of the former, be taken by the

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wife at his death by virtue of these secret claims, and the creditor be turned off without a penny.

It is hardly to be imagined that such provisions would be endured in so commercial a country as France is at this day; even with the publicity which by the Code is supposed to be given to these acts of marriage.

On looking farther into the provisions of the *Code Civil*, this impression is confirmed. In the distribution of the community on its dissolution, where the wife does not renounce; to the mass of existing property, is to be added from the respective parties, all that each has withdrawn or is indebted to the community. The *passive* is then to be borne, and the debts of the community are to be at the charge of each of the married parties, in moieties. The wife's liability for these debts, is limited to the amount of her emolument; but the husband's goes to the whole extent of his separate property. If however the husband has no such property, not only the proper debts of the community, but also the debts of the husband contracted while it continued, fall upon the property of the community. These debts are equally entitled with the debts of the wife for indemnity and recompense, to *exercise an action* against the community; and thus there can be no legal priority in favor of the one or the other. The renunciation of the community relieves the wife from personal contribution to its debts. (Code, B. 3, title 5, sect. 5, 6. Articles 1467, &c.) And where the Act of marriage gives to the survivor the portion of the decedent in the community, the wife surviving has her election, either to take such portion, *becoming bound for the debts of the community*, or to renounce the community and abandon its property and *charges* to the heirs of the husband. (Article 1524.) Here again the creditors appear to stand upon as good a footing as the wife.

The title relative to *Privileges and Mortgages*, (article 2093,) provides that the property and effects of the debtor are the common pledge of his creditors; and the value thereof is distributable equally among them, unless there exist among the creditors, *lawful causes of preference*. The lawful causes of preference are *privileges and mortgages*; and *privilege* is defined to be a right which the quality of his credit confers upon a creditor, of being

preferred to others, even to mortgage creditors. (Articles 2094, 2095.)

The ranks between privileged creditors are then declared. Those in the same rank are to be paid rateably.

The *privileges* are then enumerated. Those over movables, are, in general, 1, law expenses; 2, funeral expenses; 3, expenses of last sickness; 4, salaries of servants; 5, supplies for family subsistence. (All these are also privileges over immovables.) The Code then prescribes privileged credits over certain enumerated movables. Amongst the privileges over immovables, are, 1, for the purchase money; 2, loan for the purchase; 3, for labor and materials laid out on buildings, &c. (Articles 2096 to 2105.)

Without proceeding farther with these interesting and well-considered provisions, it suffices to say, that no *privilege* is accorded to a wife by the Code, for her claims under a contract of marriage.

Mortgage is by the Code restricted to *immovables*, and it is either legal, judicial, or conventional; and takes place only in the cases, and according to the forms authorized by law. (Articles 2114 to 2119.)

Legal mortgage results from the law, and among the rights and credits to which it is applicable are those of married women upon the property of their husbands; (articles 2121, 2122;) and the right is to be exercised under certain modifications. It is this *legal mortgage* which is mentioned in the eighth article of Mrs. Ordronaux's marriage contract. The contract could not, however, enlarge the provisions of the Code as to mortgage.

Judicial mortgage, is analogous to our liens by judgment and decree.

Conventional mortgage, depends on covenants and acts of the parties, and can only be made by an Act passed in authentic form before a notary.

Therefore neither judicial or conventional mortgage have any application to this case.

Mortgage by the Code, takes precedence from the day of enrolment, with but two exceptions. One of these is for the bene-

fit of women by reason of their matrimonial covenants, for whom it exists independent of enrolment. Husbands are nevertheless enjoined to cause enrolments to be made of the incumbrance of wives on their immovables, and on default, enrolment must be demanded by the commissioner in the civil court at the domicile of the husband, or at the place where the property is situated.

Besides these provisions for publicity of the wife's mortgage, it will be borne in mind that the marriage covenants which result in this species of lien, can only be made by an Act before a notary, which remains a record in the public archives of the place where it is made, and they cannot be altered after the marriage is celebrated.

To the end that *mortgage* in favor of the wife may not render immovables virtually inalienable during coverture, the Code contains provisions for discharging the enrolment where it exists, and for exonerating the property from the mortgage, where there is no enrolment, in favor of purchasers. (Articles 2181, 2193, &c.) The result is that in France, the wife has no preference over other creditors in respect of the *movables* of her husband. She has no lien by way of *privilege* over his immovables.

She has a *mortgage* upon his immovables, which is notified to the public by her marriage articles, recorded at the domicile of the parties when they were married; and if the husband or commissioner of the civil court has discharged the duty imposed upon them, registered in the office of mortgages within the jurisdiction in which the property is situated.

It is abundantly manifest from these provisions of the Code Civil, that whether the premises in question be deemed the property of John Ordronaux, or of the *community*, the complainant has no lien or priority over other creditors. The Code refuses to contracts made in a foreign country the force of a *mortgage* in France; (article 2128;) and it would be a great stretch of international comity, to extend the local provisions of the Code which give a lien upon lands in France for the covenants of marriage, to real estate in this country. Independent of the entire inapplicability of the French mode of notifying purchasers and in-

cumbrancers ; in this state, and I believe in every country, immovables are controlled by the *lex loci rei sitæ*. We have our own modes of authenticating incumbrances, and our own laws regulating equitable liens. Creditors of persons domiciled and having property here, have a right to look to those laws and those only for the administration of their debtors estates. Justice to our own citizens forbids that we should yield a priority, such as is here claimed, upon the faith of a secret agreement made and registered in a foreign country twenty years before the parties had an interest in the property in question. It will be sufficiently oppressive on creditors dealing upon the faith of visible property, if we accord to the complainant the participation as a creditor, which the French laws appear to concede to her.

The cases to which I was referred, *Decouche v. Savetier*, 3 J. C. R. 190 ; and *Le Breton v. Miles*, 8 Paige, 261, arose between the parties to marriage settlements, or their representatives. There was no conflict in either case with the rights of creditors.

Mr. Justice Story says that as to immovable property, a contract of marriage made between parties in a foreign country, will at most, confer only a right of action, to be enforced according to the jurisprudence *rei sitæ*. Story's Conflict of Laws, 160, § 184. He cites to the same point, Henry on Foreign Law, 48, 49, 95.

With this authority and the plain good sense of the matter concurring, I must hold that the complainant has neither a lien upon, or a priority over, the real estate in dispute.

As the bill proceeds solely upon the ground of preference and equitable lien in favor of the complainant personally, it cannot be sustained.

This conclusion leaves untouched the rights of the complainant as a creditor, and also the defendants claim to set off their debt against the rents.

The bill must be dismissed with costs,

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Where a testator directed his executors to sell his lands and to distribute the proceeds amongst various persons together with sundry charitable institutions ; it was held that there was a conversion of the real estate and the gifts were to be treated as legacies.

It was also held, that if they were to be deemed land, they were nevertheless valid, because the revised statutes relative to Uses and Trusts, do not apply to Charitable Uses.

A bequest for the use of the poor of a town, and one to an unincorporated religious association for the use of its poor ministers, are not within the provisions of the statutes against perpetuities.

Charitable uses were bestowed in England, and were recognized by law, before the Norman conquest ; and they were always fostered and protected by the common law. They were subject to the jurisdiction of the court of chancery long before the statute of Charitable Uses, 43d Elizabeth ; and this, whether the trustees were a corporation or individuals, and whether the gift were to trustees by name, or for a definite and specific object without naming trustees.

The revised statutes against perpetuities and regulating uses and trusts, were aimed at private trusts and accumulations for remote posterity. Public trusts and charitable uses were not within the intention of the legislature, or the spirit and object of the enactment.

The English statute of Uses, 27 Henry VIII., did not apply to public uses or charities.

A bequest for the benefit of poor ministers of a specified religious denomination, is valid, though it does not appoint the trustees of the fund. And it is competent for the testator to empower the executors and trustees of his will to designate the first trustees of such fund. If it were otherwise, the trust would remain and the court of chancery would appoint the trustees.

A bequest for the ministers of the New York Yearly Meeting of Friends called Orthodox, who are in limited and straitened circumstances, is not too vague or uncertain, or too indefinite in its objects.

So of a bequest for the relief of such indigent residents of the town of Flushing, as the trustee or trustees of the town for the time being should select.

Both gifts were held to be valid.

April 2 ; August 6, 1844.

THE bill in this cause was filed by the sole acting executor of Nathaniel Smith, late of Flushing, deceased, for a construction of his last will and testament, and for directions as to the disposal of the residue of his estate. The will bore date the 22d of May, 1833, and the testator died in 1835.

It made numerous bequests for charitable purposes, which were not questioned.

He directed his executors, as soon as conveniently might be after the death of his wife, to sell his house and lot in Broadway, in New York, and to distribute the net proceeds among sundry legatees and benevolent institutions; among which dispositions were the two following, which were controverted.

"The sum of four thousand dollars to my said friends, Benjamin Clark, Joseph S. Shotwell, Samuel Parsons, and William F. Mott," (who were his executors,) "or to the survivors or survivor of them, or to the executors or administrators of such survivor, to be invested or placed at interest in the names of suitable trustees, and under such regulations that the interest or income thereof may be distributed and divided annually forever under the direction of the New York Yearly Meeting of Friends called Orthodox, unto and among such Orthodox ministers of such society in limited and straitened circumstances, especially those who travel in the ministry, as the said meeting, or its committee, shall, for that purpose, name and designate; such interest or income to be distributed during the sittings of said yearly meetings annually forever; and as I hold the privilege of attending our yearly meetings to be very important to many pious and worthy ministers, and believe that small pecuniary aid to such as are in limited and straitened circumstances would enable them to enjoy that great privilege, and hope that others may think well of the example, and may thereby be induced to make similar bequests, it is my wish that this legacy or appropriation of four thousand dollars to be invested or placed at interest, shall be so invested as to perpetuate in the society the knowledge of my great desire for its growth and prosperity, and to which end I wish that the existence of the fund, together with the name of its founder, and also its object, shall be publicly made known annually forever by the yearly meeting."

The other was a bequest of four thousand dollars to the executors by name, "or to the survivors or survivor of them, or to the executors or administrators of such survivor, to be invested permanently in such way and manner that the interest or income thereof may be appropriated annually forever as follows: that is

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to say, for the relief of such indigent persons residing in the *township of Flushing* aforesaid, as the trustee or trustees for the time being shall select for that purpose, one hundred dollars thereof in fuel, one hundred dollars thereof in money, and the residue in bibles, testaments, tracts, and other religious books at a low price, the bibles and testaments to be purchased of the said Bible Association of Friends in America, if they can be procured from that institution on as good terms as from the American Bible Society, otherwise they are to be procured from the American Bible Society or elsewhere, and the surplus to form part of my residuary estate."

The residuary bequest in the will was to the executors in trust for an institution in Philadelphia known as the Bible Association of Friends in America, the American Bible Society, and the American Tract Society. And he provided that in case any of his bequests should fail by reason of misnomer, the incapacity of the legatees to take, or otherwise, he gave all such bequests to his executors absolutely, trusting that they would apply them according to his intent and meaning.

After the widow of the testator died, the executors sold the house and lot in Broadway for nearly \$18,000. The bequests which were payable out of the proceeds, were \$26,000. The executor also had remaining the residue of the personal estate, about \$2700.

The various legatees and next of kin of the testator, were made parties to the suit. The American Bible and Tract Societies, by their answers insisted that the bequests to the Orthodox Yearly Meeting, and to the poor of Flushing, were invalid and illegal; and that the sums given to those objects should fall into and become a part of the residuary estate to which those societies were entitled.

The Association for the Relief of Respectable Aged Indigent Females in the City of New York, made the same objection to the bequests before particularly stated; insisting that the same should in the first instance be applied to make good the respective valid legacies carved out of the proceeds of the Broadway house and lot.

The same ground was taken by N. Smith Prentiss, in behalf

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of himself and other legatees for whom he was trustee, who were entitled to participate in the proceeds of that house and lot.

William F. Mott, one of the executors who did not qualify as such, answered, claiming that the amount of the two contested bequests if they were invalid, should be paid to the four persons named as executors, pursuant to the last paragraph of the will, absolutely, or with such limitations and directions as the court should think proper to comake, nsistent with the meaning and intent of the testator.

M. S. Bidwell, for the complainant.

George Wood, for the Orthodox Yearly Meeting and the Bible Society of Friends in Philadelphia.

B. W. Bonney, for the Town of Flushing.

H. Holden, for the American Bible Society and American Tract Society.

P. A. Cowdrey, for the Association for Respectable Aged Indigent Females.

S. G. Raymond, for N. Smith Prentiss and others.

THE ASSISTANT VICE-CHANCELLOR.—This suit is brought to obtain the direction of the court, and to settle the construction of the will of Nathaniel Smith, who resided in Flushing for a great many years prior to his decease.

It is urged on the part of several of the defendants, that the bequests for the benefit of the New York Yearly Meeting of Orthodox Friends, and for the relief of indigent persons in the township of Flushing, are invalid.

As most of the objections to these bequests apply equally to both, I will consider them together.

FIRST, It is insisted that all express trusts are abolished by the Revised Statutes, except those enumerated in the article

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"*Of Uses and Trusts*," and that these trusts are not contained in that article.

The gifts in question are purely *Charitable Uses*; and most if not all of the difficulty on this subject, has arisen from the mistaken idea in the courts of some of our sister states, and at one time in the Supreme Court of the United States, that the Court of Chancery in England derived its jurisdiction over this class of trusts, from the statute 43 Eliz. of Charitable Uses. There was some obscurity on this point prior to the publication by the Record Commission of the Calendars of proceedings in Chancery during the reign of Queen Elizabeth, with some examples before her reign; although the weight of judicial authority vastly preponderated in favor of the existence of that jurisdiction at common law, long before the time of the Tudors.

That publication and the subsequent decisions have abundantly settled the question in favor of the jurisdiction. In my recent decision of the Lutheran Church cases in Schoharie county, (*Kniskern v. Lutheran Churches, &c.*)(a) I had occasion to speak of this subject; and I will now dwell upon it no farther than to say that since writing my opinion in that cause, the decision of the Supreme Court of the United States upon the will of Stephen Girard has been published, and that court has declared that there is no longer any doubt upon the question. (*Vidal v. Girard's Executors*, 2 Howard's U. S. Rep. 196.) See also in this state, *Orphan Asylum v. McCartee*, 9 Cowen, 437, 477, per Jones, Chancellor; *Dutch Church in Gardenstreet v. Mott*, 7 Paige's R. 77; *Potter v. Chapin*, 6 id. 639; *Wright v. Methodist Church*, 1 Hoff. Ch. Rep. 202, 241.

And this jurisdiction was irrespective of the circumstance whether the trustees were a corporation or individuals, and whether the gift was to trustees by name, or merely for an object sufficiently definite and specific to be carried into effect.

Devises to ecclesiastical corporations and institutions, were restricted by various statutory provisions in England, and the

(a) Vol. 1st, pages 439, 562.

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same restraint extended to charitable uses, (with the exception of certain colleges,) by the statute 9 Geo. II. ch. 36.

Until that statute was enacted, charitable uses, with the exception which I have stated, were not only tolerated, but fostered and protected by the common law.

They were engrafted into the Roman law concurrently with the growth of Christianity; and with the same benign influence, they became a part of the common law of England. They were recognized and in use before the Norman conquest.

We inherited from our mother country the law of charitable uses, with the blessed spirit that gave rise to it; and our land is filled with religious, literary and benevolent institutions, liberally endowed by that spirit and upheld by that law.

Did the revised statutes intend to cut off gifts and devises to charitable uses for all time to come? For if the article "*Of Uses and Trusts*" applies to charitable uses, that must have been the intention in respect of all save devises to corporations directly for their own use.

The proposition is startling, and of vast importance. And I presume every one on first hearing it, will declare that it is impossible; that no legislature in the nineteenth century could have intended such a result.

I do not think that such is to be the construction of the act.

That it was not the intention, clearly appears by the notes of the revisers accompanying this article when it was submitted to the legislature. They proposed sweeping and radical changes in the existing law of uses and trusts, and stated their reasons and objects fully and elaborately. But there is not one word upon the subject of charitable uses. They were treating wholly of private uses and trusts; of those intricacies and refinements in the dealings of individuals with real property, which had perplexed conveyances, and filled the courts with litigation. They proposed to cut up this class of estates by the roots, and the legislature adopted their suggestion and destroyed it most effectually.

But public trusts, and charitable uses, were not within the purview of the lawgivers. The evils which they sought to re-

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medy, were not incident to those trusts. The provisions which they enacted for preserving what was useful and beneficial in private trusts, are inapplicable to the administration of charities.

If the bequests in question are within the statute of "Uses and Trusts," so are all gifts and devises to eleemosynary corporations. Those corporations take and hold property, in a great measure for public uses, not for the benefit of the corporators. The revised statutes ostensibly left the acts relative to religious and literary societies and libraries untouched. Yet if this construction is to prevail, they can no longer take real estate by donation, except as permitted by the act of 1840.

Applying the principle of construction, that the general words of a statute are to be limited to the subject matter, we are relieved from consequences so contrary to the public interests, and so repugnant to the spirit of the age.

The article, of Uses and Trusts, relates to private trusts. It was not intended to affect charitable uses or public trusts, which spring from benevolent instead of interested motives, and are for the benefit of classes of people not personally known to the benefactor, not for the pecuniary advantage of a designated individual.

A farther argument against this construction may be derived from the Statute of Uses, 27 Hen. 8th, ch. 10. The terms of that statute are abundantly sufficient to cut off all charitable uses, as well as the private uses which at that day were equally obnoxious to the arbitrary sovereign of England.

Yet it never appears to have been supposed that the statute of uses had any application to public charities, or that such uses could be executed under that act. The statute of 23 Hen. 8th, ch. 10, aimed at *superstitious uses*, continued to receive judicial construction on cases which arose subsequent to the 27 Henry 8th. Then followed the statute of 1 Edward 6th, ch. 14, (with its beautiful recital,) enacted against superstitious uses, and a long series of reported decisions thereon; a statute which was wholly unnecessary, if the statute of uses had any application to charities. Of these decisions I will only refer to *Pitt v. James*, Hobart's R. 123; *Adams' and Lambert's case*, 4 Reports, 96, 104, and the cases there stated; *Launcelot v. Adams*, Cro. Car. 248; and *Humphreys v. Knight*, *ibid.* 455.

A parish, before the statute 27 Hen. 8th, could not stand seised to uses, but such a gift, since the statute would be good as a trust for the parishioners, if not a superstitious use. See Saunders on Uses and Trusts, 90.

Mr. Cruise, in treating of uses, makes no allusion to charitable uses, but in the title "*Deed*" he says that before the statute 9 Geo. 2, ch. 36, (of mortmain,) lands might be given for the maintenance of a school, a hospital, or any other use of that nature; in short, for every charitable use which was not expressly prohibited by the previous statutes of mortmain. (Cruise's Dig. title, *Deed*, ch. 2, s. 32, 33.)

This furnishes a strong argument against the extension of the provisions of our statute of uses and trusts to charities; a species of trusts not within the intention of the legislature, or the spirit and object of the enactment.

Such, in brief, are my views on this important question. Without as yet deciding upon the validity of the two bequests on this ground, I will proceed one step farther in the argument.

The testator orders and directs the executor, as soon after the decease of his wife as could conveniently be done, to sell and dispose of his house and lot in Broadway, absolutely in fee simple; and then to distribute and divide the net proceeds in the manner following, and *he gives the same accordingly*. The two bequests under consideration are among those to be paid out of the proceeds.

The gift, therefore, is not of land, but of the proceeds of land after the same is converted into money. The conversion is not made to depend on the payment of these bequests, nor can it depend on their validity, for a large number of unquestioned legacies are to be paid out of the same net proceeds. The direction to sell is absolute, and independent of the distribution of the proceeds.

There is no doubt, therefore, that these two bequests are mere legacies; literally, bequests of personal property. (See *Cruse v. Barley*, 3 P. Will. 20, 22, and the note of Mr. Cox; *Amphlett v. Parke*, 2 Russ. & Mylne, 221; *Gott v. Cook*, 7 Paige's R. 534.)

As legacies, the statute relative to *uses and trusts* has no ap-

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plication. I will, therefore, on this ground decide against the first objection to these gifts; not hesitating to say, however, that if their validity depended on the application of the statute, I should hold that it did not extend to them.(a)

SECOND. It is objected that the absolute ownership of the moneys bequeathed is suspended in perpetuity, and beyond the period limited by the revised statutes. If this objection be well taken, it is equally applicable to every gift or bequest to a corporation of any kind, which has a perpetual charter. And it is as fatal to several other legacies given by this will, which are not drawn into question, as it is to the two for the poor of Flushing and the Orthodox Friends.

The legal restrictions against *perpetuities* were never directed against gifts for charitable uses, or even for any eleemosynary purposes. From the nature of such gifts, while the good of mankind is to be subserved, they are often designed to continue to the end of time. The longer they are to endure, the

(a) There have been some interesting decisions on this subject, in the Supreme Court of North Carolina.

In *The State v. McGowan*, 2 North Car. Rep. (Iredell's Equity,) 9, it was decided that a devise of property "for the establishment of a school or schools for the benefit of the poor of the county of Duplin," was a valid devise, and was not such a perpetuity as is prohibited by the constitution of North Carolina or by the common law.

In *The State v. Gerard*, 2 *ibid.* 210, there was a devise of lands to the poor of the county of Beaufort, on the express condition, that the lands were never to be sold, or to be let for over seven years at a time, and that they were to be rented or cultivated as the wardens of the poor should deem most advisable. The court held that the legal title did not vest in the wardens; that it was a devise to such a charitable purpose as was allowed by law before their statute concerning charities; and was sufficiently definite to authorise equity to enforce it; and that the perpetuities forbidden by their constitution are estates settled for private uses, and do not include public charities.

In *Holland v. Peck*, 2 *ibid.* 255, the executors were to pay over and deliver the proceeds of bank stock "for the benefit of the Methodist Episcopal Church in America whereof F. Anbury is the presiding bishop, to be disposed of by conference or the different members composing the same, as they shall judge will be most expedient for the increase and prosperity of the gospel." It was held that the bequest was void, because it was made to a multitude of unincorporated persons in their aggregate capacity, and the object of the bequest was of so indefinite a nature that the court could not determine how it should be applied.

better for the public interests. It is the policy of the law to encourage, not to restrict their extent and duration.

But perpetuities for the aggrandizement of remote posterity, while the immediate and more just objects of the care of the donor are left in poverty and want, are abhorrent to the law, and equally at war with justice and with public policy.

If Peter Thelusson had given his millions for the benefit of the destitute, in a charity like that of Stephen Girard, we never should have heard of the *Thelusson act* against perpetuities.

It is well settled in England, that real property, devised to trustees of charities, is not inalienable; and therefore the objection raised to these gifts on that ground would hardly be tenable, if they were to be regarded as land instead of money. Thus, in *Attorney General v. Hungerford et al.* 2 Clark & Fin. 357, 374, a lease of a charity estate made by the trustees, with perpetual renewals, was upheld; and it was decided that the question is one of provident or improvident management. Lord Brougham, Chancellor, said that there is no principle which absolutely prevents alienations by trustees of charities; and that there may be cases in which the trustees could not do their duty to the charity, if they did not alienate a part of the land.

Sir Thomas Plumer, Master of the Rolls, held the same in the *Attorney General v. Warren*, 2 Swanst. 291, 302. And see *Attorney General v. Cross*, 3 Merivale, 524, 530; Shelford on Mortmain and Charitable Uses, 688, &c.

In the case of the *Dutch Church v. Mott*, 7 Paige, 77, before cited, the Chancellor says that our religious corporations have an unlimited power to alien lands, subject to the previous approbation of the Court of Chancery, pursuant to the statute.

And this provision apparently differs from the English rule only in this, that there the courts must see cause to approve the alienation when the question comes before them, unless lapse of time shields the purchaser from that inquiry.

In *Griffin v. Graham*, 1 Hawk's R. 96, in the Supreme Court of North Carolina, in equity, the testator devised all his estate to his executors and trustees, in trust to found and maintain a free school out of the issues and profits. He desired that his

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real estate should not be sold but rented ; and declared, to prevent misconception, that the amount of his real and personal estate, was to be considered as a principal sum and remain undiminished forever. It was held, among other things which I will notice elsewhere, that the will did not create a perpetuity, for the trustees have the power of alienation ; that the notice which might affect purchasers in equity is a circumstance collateral to the power of selling, and will not affect the question of perpetuity. That the clauses in the bill of rights and constitution, were designed only to prevent dangerous accumulations of individual wealth, and referred to estates tail alone. And that the establishment of a *permanent fund for charitable uses*, does not come within the mischief, and is not prohibited by either of those clauses, or by the common law. Ch. J. Taylor says, "assuredly property applied to these ends never entered into the common law notion of perpetuity ;" otherwise the objection would have been taken in the many cases of similar dispositions which are found in the books.

It appears that the North Carolina bill of rights declared that perpetuities and monopolies are contrary to the genius of a free state and ought not to be allowed. And section 43d of the constitution, declared that the legislature of the state should regulate entails in such a manner as to prevent perpetuities.

But to resume the consideration of these gifts as personal estate.

Our statute against the suspension of the absolute ownership of personal property, (1 R. S. 773, § 1,) was avowedly founded on the Thelusson act, 39, 40 Geo. III. ch. 98—as may be seen by the reports of the revisers on bringing it before the legislature. See revisers' notes, 3 R. S. 2d ed. 612 ; also p. 572. They say that "the English act relates to personal as well as real estates, and the same mischiefs are to be apprehended in each case. The spirit of our institutions is hostile to such investments."

This, and the subject matter, private and personal accumulations, suffice to show that a gift to a charity was not within the intent of the statute or its spirit. It is therefore not within the enactment. It would be absurd to say that a bequest for the use of the poor of the town, or for the maintenance of poor ministers

of the Gospel, should not continue beyond two specified lives in being, *because* their continuance would be mischievous or hostile to the spirit of our institutions ; or to assert that because the postponement of the use and enjoyment, and the accumulation of a private fortune, for 80 years, as was attempted by the will of Thelusson, is an enormous evil, therefore those poor people, or equally destitute ministers, of the next generation, ought not to be permitted to taste of the bounty of Friend Nathaniel Smith.

It is not to be denied that the letter of the statute reaches these bequests. The re-investing of the money from time to time, makes no change of the ownership. (See *Hawley v. James*, 5 Paige's R. 445, per Walworth, Chancellor.)

But the object of the statute, being to prevent posthumous accumulations of large fortunes and the pampering of a spurious aristocracy, is in truth promoted by charitable gifts, which will diffuse the benefits of an estate in small amounts among the lowly and indigent.

I am satisfied that this objection to the legacies in question is not well founded.

THIRD. The bequest for the benefit of the orthodox ministers of the Friends, it is said, is void, because it does not appoint the trustees who are to hold the fund. And it is farther urged that the trustees under the will, cannot be clothed with the power of designating such trustees of the fund.

This is not a power to create a trust, but at most it is a power to name the first trustees to administer a trust created by the testator. I do not see that it is objectionable. And if it were, the trust would remain, and the court would designate the trustees.

In *Potter v. Chapin*, 6 Paige's R. 639, there was a donation of a school house for the benefit of a village. It was given to no one by name, nor for any particular children or inhabitants. Yet it was held a gift for a public charity, which this court would sustain. And on the school becoming incorporated, the estate vested in the corporation. And see *Moggridge v. Thackwell*, 7 Ves. 36 ; *Wellbeloved v. Jones*, 7 S. & S. 40.

In the school house case, if there had been no subsequent incorporation and no mode of succession established, the Chan-

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cellor would have established one, so that the trust should not fail.

So in *Moore's Heirs v. Moore's Devisees and Executors*, 4 Dana's R. 354, 357, the Court of Appeals in Kentucky held that where a charity was given, and no trustee appointed by the will, a court of equity will act as trustee and appoint one if necessary.

I should mention that in the same case the court overruled the objection that the trust was void by reason of its locking up the money in perpetuity.

The bequest to the poor of Flushing is made to the trustees of the will, and is not obnoxious to the third objection.

FOURTH. It is urged against both bequests that the trusts are too vague and uncertain, and the objects too indefinite to enable the court to sustain the trust.

The cases referred to in support of the objection were those where no object whatever was designated ; as a bequest for such objects of benevolence and liberality, as the trustee might approve in his own discretion.

Here the designation is specific. One is for ministers of the New York Meeting of Friends called Orthodox, who are in limited and straitened circumstances, especially those who travel to the yearly meeting. The association of Friends, thus spoken of, is well known and of long standing. There is no difficulty in its identity. Nor is there any doubt as to the meaning of limited and straitened circumstances.

The other is still more specific. It is for the relief of indigent residents of a town. In both cases the power of selecting is necessarily conferred : but that renders the gift no more indefinite. If it were to all the poor or indigent, the trustees would have to exercise a similar discretion.

In the case of *Griffin v. Graham*, before cited, the court held that the trust was for a definite charity, and a specific object pointed out, and the court would take cognizance of the case by virtue of its ordinary jurisdiction as a court of equity. There the trustees were to buy two acres in Newbern, build thereon a school house, employ a school master, and educate therein as many orphan children or children of poor and indigent parents,

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whom they deemed best entitled, as the funds were found equal to. They were also to clothe and maintain the children, and to bind them out to suitable occupations, when they arrived at the age of fourteen. And see *King v. Woodhull*, 3 Edw. Ch. R. 79, 85; *Wright v. Trustees of Methodist Church*, 1 Hoff. Ch. R. 202, 239.

In the *Mayor &c. of Philadelphia v. Will's Executors*, 3 Rawle's R. 170, the devise of both real and personal estate was to found a hospital for the relief of the indigent blind and lame. And in *Martin v. McCord*, 5 Watts, 494, the gift was of land on which to build a school house for the benefit of the neighborhood.

In the *Sailor's Snug Harbor Case*, 3 Peters, 99, the noble charity of Capt. Randall; the devise was made to maintain aged, decrepit and worn out sailors.

In *Moore's Heirs v. Moore's Devisees*, &c. 4 Dana's R. 354, the devise was for educating poor orphans of Harrison county, to be selected by the county court. And the court say in that case, that it is not an objection to a devise or legacy, that it is for the benefit of a class of private individuals, if they are described collectively by some characteristic trait by which they may be identified.

In *Bartlet v. King*, 12 Mass. 537, the bequest was to trustees, for the persons constituting the American Board of Commissioners for Foreign Missions, for the purposes of the board and to promote the pious objects thereof. It was held valid, although the objection was made that it was void for uncertainty, the board being a voluntary association, and the persons for whose benefit it was intended, incapable of being known or ascertained.

The books are full of similar cases.

Mr. Shelford says almost all the charities which are to be administered in the Court of Chancery have one of four objects in view.

1. Relief of the poor in various ways. 2. The advancement of learning. 3. The advancement of religion. 4. The advance of objects of general public utility. (Shelf. on Mort. and Char. Uses, 61.)

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He gives numerous examples of all these, and of many under the 1st and 3d heads, which are decisive against the objection made here for vagueness and uncertainty. (Ibid. 60, &c., 71, &c., 104, 105.)

Among his examples are, "for the relief of the poor of a parish;" and for the poor in various shapes and forms; and numerous gifts for the support of preaching ministers, and for the support of poor dissenting ministers.

And see the celebrated case of Lady Hewley's charity; *The Attorney General v. Shore*, 7 Simons, 290, note; 11 Simons, 592; and 9 Cl. & Fin. 355; where the trusts were far more indefinite than these.

FIFTH. As to the objection that the trustees of the town of Flushing are not competent to hold real estate. The answer is, that the bequest is not of land, nor is it made to those trustees. They are only to select the indigent residents of their town, who shall receive the annual bounty provided for them by the testator. There is nothing illegal or questionable in this.

If the bequest were directly to the trustees of the town, the case of *Coggeshall &c. Trustees of New Rochelle v. Pelton*, 7 J. C. R. 292, seems to be decisive of its validity.

There must be a decree declaring the trusts of the will accordingly. The parties who appeared at the hearing are entitled to their costs out of the fund.

Decree accordingly.

DIDIER, survivor of D'Arcy, v. DAVISON, survivor of Hill.

A plea of the statute of limitations, setting up two matters, either of which establishes that defence, is not for that cause a double plea.

A debtor who had failed and whose debt was past due, assured his creditor in writing, that he would pay if he became able. The creditor did not agree to forbear the debt, but he omitted to sue, and the debtor afterwards became able to pay it. *Held*, that the creditor's action accrued on the debt falling due, and not on the debtor's becoming able to pay.

Equity, before the revised statutes, applied the doctrine of limitation of actions, by analogy to the construction and application of the statute in the courts of law in like cases.

Under the statute of limitations enacted in 1813, it was not necessary that the person relying upon a return to this state as commencing the period of limitation, should have resided here full six years after such return; nor that his residence here should have become known to the creditor.

It sufficed that the debtor's return was open and public, and made with the intent to reside in the state.

J. residing in the West Indies, in and prior to 1816, became largely indebted to D. & D., merchants in Baltimore. He failed, and went to England, from whence in 1817, he wrote to the D.'s promising to pay when he became able. Subsequently he went to South America and resided there several years. In March, 1834, he came to New York to reside, having sent his family here in the summer of 1833. He declared his intention of becoming a citizen in April, 1834, and he and his family resided here, openly until September, 1835, with the exception of his own temporary absence from March, till July, 1835. In November, 1843, D. commenced a suit in equity in this state against J. to which J. pleaded the lapse of time, setting up as a bar his residence here in 1834 and 1835. *Held*, that the plea was a good bar to the suit.

Amending a plea, defective in form.

June 14, 15; August 8, 1844.

THE bill was filed by Henry Didier as surviving partner of the firm of Didier & D'Arcy of Baltimore in Maryland, against James Davison as survivor of the firm of Davison & Hill. It set forth a large indebtedness by the latter firm to D. & D. arising upon bills of exchange and a joint shipping adventure in 1815 and 1816. D. & H. transacted business in the island of Hayti, and also in Baltimore where Hill lived. Davison resided in Hayti. D. & H. failed in 1816, and then owed D. & D. over \$30,000. The bill set forth sundry letters from Davison to D. & D. in 1816 and 1817, some written from Hayti and others

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from London, acknowledging the debt and promising to pay it whenever he became able. That he has resided out of the United States ever since, and neither he nor Hill have been in the country, except a temporary visit which the defendant pretends Hill made in 1820, and another by Davison in 1834; as to which, the bill alleges that Hill was worth nothing in 1820, and D. & D. were ignorant of the visits of both Hill and Davison, and while here, they avoided D. & D. That Davison while in the United States in 1834, did not appear as a business man, nor purchase nor rent a house or store, nor did his name appear as residing here in any manner; and he did not leave or afford D. & D., any opportunity of enforcing their claim; and that he did not become able to pay the debt till after 1830.

Davison put in a plea in bar, accompanied by an answer. He set up in his plea that the complainant's cause of action or suit arose six years before filing their bill, and six years before serving or suing out process against him to appear and answer the same. The plea then traversed the allegations of the bill as to the defendant's continued residence out of this state, and averred his actual and open residence in New York with his family, from March 7, 1834, to March, 1835, when he left the state, returning in July, 1835, and then continued to reside here until September, 1835, and during his residence he continued to transact mercantile business here.

The plea also averred that Hill came to this state to reside in 1820, and continued actually and openly to reside here for three or four years next thereafter.

The answer in support of the plea averred the defendant's residence as before stated, and that on the 5th of April, 1834, he filed in the usual form, his intention of becoming a citizen of the United States. That his absence from March to July, 1835, was temporary; and that when the bill was filed, he was an actual resident of this state. That in the summer of 1833, he sent his family from New Grenada in South America, where he was then living, to New York, intending to change his residence and reside permanently in the United States. That his arrival here was published in the list of the passengers inserted in the newspapers. The answer then states his boarding with

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his family in various public boarding houses in the city of New York, his keeping house openly in one place from the first of May till October, 1834, and in another, from that time till March, 1835. That he lived openly and without concealment, and received from his friends and acquaintances, visits in the most public manner. That in March, 1835, his business required him to go temporarily to South America, which he did, leaving his family in New York. He returned in July, and in August hired a house in Brooklyn for a year, and moved into it with his family. And when he left in September, 1835, his family remained, residing in that house. In July, 1834, he entered into a copartnership with a house here, in which he was described as residing in New York. The business was to be transacted mainly in South America, by one of the partners residing there, but the defendant's interposition in its management, appeared to have been intended to take place here. He transacted much business here, which was done at the office of his partners. His name did not appear on any sign, and he rented no store house.

The answer also set forth Hill's residence in the state of New York from 1820 to 1823 or 1824, and that he died at sea in 1824 or 1825.

The cause came before the court on the sufficiency of the plea.

James Smith, for the defendant in support of the plea.

C. B. Moore, for the complainant.

THE ASSISTANT VICE-CHANCELLOR.—The complainant raises some questions upon the form of the plea, which are first to be considered.

1. It is said to be double, because it sets up two matters, either of which, if they be a defence at all, constitutes a full defence to the suit, viz: the return of Hill to this state in 1820, and Davison's residence here in 1834.

The defence set up by the plea, is that the demand is barred by the statute of limitations. This is a single point, and both of these facts are brought forward to support it. I think the decision of Lord Thurlow in *Whitehead v. Brockhurst*, 1 Bro. C. C. 404, sustains the plea. He illustrates the point by suppo-

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sing many deeds stated in a plea to establish the defence of title. And if the deeds came from adverse claimants of the title, the case supposed would be analogous to the two distinct facts stated here.

2. Another objection is that the plea and answer do not meet the charge in the bill that Hill & Davison avoided the complainant and his partner, and afforded them no opportunity to sue or enforce their demand; also they omit to answer as to what business Davison transacted here, and other material facts which show that the complainant had no means of knowing of his residence here.

Without going into a comparison of the bill and answer, I need only say that these allegations are sufficiently traversed to present fairly and distinctly the question on the statute of limitations. And indeed, if the plea were informal and insufficient on either of these grounds, it is a case in which the court would permit it to be amended, provided the defence attempted to be set up appears to be well founded. (Beames' Pleas in Eq. 320. 2 Daniells' Ch. Pr. 230.)

I will therefore proceed to the merits of the case.

First. I cannot assent to the complainant's position, that the action accrued, only on Davison's becoming able to pay the debt. It appears by his letters, that in substance he assured Didier & D'Arcy that he would pay them if he became able to discharge his engagements. But there was no corresponding promise to forbear, nor any consideration moving from Didier & D'Arcy. They could have sued him as well in 1817, as at this moment, so far as it depended on any compact between the parties.

The cause of action must therefore be deemed to have accrued in 1816 or 1817, and the provisions of the four first articles of the statute of limitations contained in the revised statutes are inapplicable to the principal questions discussed. (2 R. S. 300, § 45; *Van Hook v. Whitlock*, 3 Paige's R. 409.)

Second. There can be no doubt but that this is a case in which the statute of limitations would be a bar, if the parties had all been residents of this state. Although the defendant sets up no actual payment, he states facts from which the law presumes payment to have been made. The demand is at first blush, a very stale claim, one at which a court of equity will be quite as

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likely to look askance as it would at the naked defence of the statute without the pretence of actual payment.

Further, the claim is chiefly upon bills of exchange; and for other branches of it, an action of assumpsit could have been brought. The whole of it was cognizable at law in assumpsit and account. The joint adventure stated in the bill, wears no aspect of a trust of mere equitable cognizance, so far as I can discover.

As equity before the revised statutes, applied the doctrine of limitation of actions, by analogy, to the construction and application of the statute in the courts of law, in like cases, it follows that these demands were barred in six years from the time that they accrued, unless they fall within some of the exceptions provided in the statute of limitations, or there is some fraud which deprives the defendant of its benefit.

The pleadings traverse the fraudulent concealment and other circumstances bearing on that question which are alleged in the bill, and the case is left to stand upon the statute itself.

Third. The proviso in the statute of limitations in force when these causes of action accrued, on which the complainant relies, is in these words: "and if any person against whom any cause of any such action shall accrue, shall be out of this state at the time the same shall accrue, the person who shall be entitled to such action shall be at liberty to bring the same within the times respectively above limited, after the return of the person so absent into this state." (1 Rev. Laws, 186, § 5.)

The language was precisely the same in the revision of the statutes made in 1801, 1 Kent and Radcliff, 564; and the provision was the same in the original act of 1788, 2 Greenleaf's Laws, 97, § 12.

First in order is the return of Hill to this state in 1820. I will however pass on to Davison's return, because if that were sufficient to cause the statute to commence running, the plea must be sustained.

It appears by the plea and answer that Davison, in the summer of 1833 sent his family to this city, intending to follow them and make his residence here; and on the 7th of March, 1834, he came to reside in this state, and continued actually and openly

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to reside here with his family and to transact mercantile business, boarding a part of the time and keeping house the residue, from thence until March, 1835, when leaving his family, he went temporarily to South America on business. He returned again in July, 1835, and resided here as before till September following, when he again went to South America, leaving his family residing in a house which he had rented at Brooklyn. On the 5th April, 1834, he declared his intention of becoming a citizen pursuant to the act of Congress. He formed a business connection here, though his name was not put up on any sign, and he hired no store. The answer discloses where he resided while in this city, and various other matters which the bill required him to discover.

The complainant insists that the return of Davison does not bar his demand, because 1. by the true construction of the act of 1813, the debtor must reside here full six years after his first return, before the statute will protect him, and that the revised statutes are in this respect, declaratory of the prior statute of limitations; and 2. if otherwise the residence must become known to the plaintiff; or be so public and under such circumstances that the debtor might have been arrested by the plaintiff by the use of ordinary diligence and due means; and that neither was the case here.

As to the first ground, the authorities are plainly against it.

In *Fowler v. Hunt*, 10 Johns. 464, the defendant stayed here about three months in 1793, and about four months in 1802, his family remaining at Demarara. The plaintiff came here with him in 1793, and knew of his being here in 1802. It was there contended for the plaintiff that such temporary visits were not a return to the state, and that a return with the intent to reside here was the only reasonable construction. But it was decided that the plaintiff was barred.

The same construction has been given to the proviso in the English statute, 21 James I, ch. 16, and the like statutes in other states which except from the bar the claims of non-resident plaintiffs. (*Strithorst v. Græme*, 3 Wils. 145; 2 W. Black. 723, S. C.; *Williams v. Jones*, 13 East, 439; *Faw v. Roberdeau's Executor*, 3 Cranch, 174.)

In New Jersey, the courts have gone so far under a statute similar to our revised laws, as to hold that the exception where the defendant is absent from the state, shall not avail a non-resident creditor whose demand is barred by the previous provisions of the act. (*Beardsley v. Southmayd*, 3 Green's R. 171; *Taberner v. Brentnall*, 3 Harrison's R. 262.)

The Massachusetts decisions are similar to our own. In *White v. Bailey*, 3 Mass. 271, it was assumed that the debtor's return, if such as would enable the creditor, using reasonable diligence, to arrest him, would cause the statute to commence running. And S. P. in *Byrne v. Crowninshield*, 1 Pick. 263.

2. As to the other ground for insisting that Davison's return was not within the meaning of the proviso in the statute.

The case of *White v. Bailey*, just cited, shows that in Massachusetts the return would be sufficient. There the debtor was in the state but 18 days, and except on Sundays, was concealed, and that was of course held insufficient. But the court say that as soon as the creditor could have a beneficial remedy by attaching the body, then the statute should begin to run. The return must be with a design to dwell in the state, and not to lurk in it as a place of concealment. In 1 Pick. 263, *cited above*, there is a *quære*, whether even a temporary return will not suffice. In *Vane v. Higginson*, 10 Mass. 29, it was insisted that the plaintiff was not barred because he was at no time within the state, while the defendant was there after the return of the latter, but the court overruled the claim. They say it is an attempt "to make an exception which the statute of limitations has not made. When the defendant came within the state, the six years began to run as it respected him."

A very sensible distinction was taken by the Supreme Court of Vermont in *Mazon v. Foot*, 1 Aikens' R. 282. They held that if the debtor come into the state having no intention to reside, he cannot avail himself of the statute without showing that the creditor had actual knowledge of such return and an opportunity to arrest him. But where he removes or returns into the state publicly, and with a view to dwell and reside permanently in the state, it is a return within the meaning of the statute of limitations; although he returns into an extreme part of the

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state, remote from his former residence and from that of the creditor, and although the creditor should have no knowledge of such return.

In 3 Cranch, 174, *before cited*, the plaintiff claiming under the Virginia statute, was held barred, because he passed through Alexandria, a border town, and was a short time therein, but not as a resident.

And the case of *Fowler v. Hunt*, *ubi supra*, contains the decisive opinion of the Supreme Court, on this point, and it is according to the plain import of the statute and the dictates of good sense. The court says, "The coming from abroad must not be clandestine, and with an intent to defraud the creditor by setting the statute in operation and then departing. It must be so public and under such circumstances, as to give the creditor an opportunity by the use of ordinary diligence and due means, of arresting the debtor."

It is obvious that the creditor's knowledge of the defendant's return or coming here to reside, ought to have no influence in construing this clause. That would indeed be adding a new exception to the proviso in the statute.

Instead of adding to it, the Supreme Court in *Sacia v. De Graaf*, 1 Cowen, 356, held that they would not extend the exceptions in the statute by construction, to cases within the reason of the exceptions, but not within their letter; and in his illustrations the Chief Justice puts the case of the residence of the defendant in some obscure or remote part of the state, unknown to the plaintiff until six years have elapsed.

If legal rights are pursued in a court of equity, the legal operation of the statute must prevail.

At law, ignorance of the plaintiff's right, its fraudulent concealment, a mistaken idea that the defendant was discharged, and like grounds, for withdrawing claims from the effect of the statute of limitations, have been rejected in our courts. (*Troup v. Smith's Executors*, 20 Johns. 33; 1 Cowen, 356, *cited above*; *Leonard v. Pitney*, 5 Wend. 30; *Allen v. Mille*, 17 *ibid.* 202.)

And in *Humbert v. Trinity Church*, 24 Wend. 587, the Court for the Correction of Errors decided that neither fraud in obtaining the possession, knowledge of the possessor that his claim is

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wrongful as well as fraudulent, his fraudulently concealing the injury, nor the plaintiff's ignorance of it till after the statute had become a bar; will excuse the negligence of the owner in not exhibiting his bill within the prescribed period. The same point as to his ignorance, was decided by the Court of Appeals in Kentucky, in *Thomas v. White*, 3 Litt. R. 177; and see *Cholmondely v. Clinton*, 2 J. & W. 155; and 4 Bligh's P. C. 1, 119.

We may therefore lay out of view the complainant's ignorance of Davison's residence here in 1834, 5.

It suffices that his return was open and public, and with the intent to reside in this state. And I may add, it is evident that the complainant might and would with very slight diligence, have found and arrested him here. If the complainant and his partner had not deemed this claim stale and wholly incapable of being enforced, they would have kept a vigilant eye on the movements of one so largely their debtor. It would not have been possible for him to have been absent with his family from Carthagena for a year and a half, without their learning it, and learning his new place of residence.

The complainant does not appear entitled to any sympathy from the court, or any effort to relieve him from the bar of the statute, which I have no doubt is an effectual defence to his demand.

I have not commented upon the case of *Bond v. Jay*, 7 Cranch, 350, cited by the complainant's counsel, because in this state, accounts between merchants were within the statutory bar of six years. (*Coster v. Murray*, 5 J. C. R. 522; *Barber v. Barber*, 18 Ves. 286.)

The plea must be allowed, and the usual order entered.

THE GREENWICH BANK v. LOOMIS and LYMAN.

A purchaser *pendente lite*, will be bound by a decree in the suit, and the complainant need not make him a party, or otherwise notice his purchase. If he desires to defend the suit, he must make himself a party to it by a supplemental bill, before it terminates.

An original bill cannot be filed by such a purchaser, after a decree in the suit pending, to litigate anew or question the subject matter of such suit.

A bill of review can only be filed after enrolment, and then only for error apparent on the decree, or to produce relevant matter existing at the time of the decree but discovered afterwards. A bill in the nature of a bill of review, may be exhibited after the decree is entered, and before enrolment.

After a decree has been made by the chancellor, it is not competent for any vice-chancellor to make any order or decree which would directly or indirectly discharge, alter or modify the same.

Held accordingly, where after a decree of foreclosure and sale obtained by default in a mortgage suit before the chancellor; a purchaser, *pendente lite*, of the lands mortgaged, filed a bill before a vice-chancellor, praying for an adjudication that the mortgage never was a lien, or if it were that it belonged to such purchaser, and that the defendant in such suit from whom he bought, had a claim to the lands prior to the mortgage.

A judgment recovered for a debt secured by a mortgage on lands, cannot become a lien upon such lands; and a sale of the equity of redemption under an execution upon such judgment, will not confer any title upon the purchaser. And it makes no difference that the judgment was not recovered upon the bond accompanying the mortgage, so long as it was obtained for, or confessed to secure, the same indebtedness.

May 15, 16, 18; August 9, 1844.

THIS was an original bill in the nature of a bill of review, filed on the 4th of June, 1842, to obtain relief against a decree made in a suit before the chancellor, in which the defendant Loomis was complainant, and Peter Stuyvesant and others were defendants.

A part of the facts material to a proper understanding of those points of the opinion which were deemed worthy of being reported, are to be found in the decision. The other material facts are as follows.

On the 12th of July, 1839, Joseph R. Stuyvesant recovered a judgment for \$10,212 32, against Peter Stuyvesant, and G. G.

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Root, for a debt due a considerable time before. This judgment was the first one recovered against P. S. and became a lien upon all his real estate. Previous to this on the 25th of June, 1839, Peter S. to secure this indebtedness, executed a bond and mortgage to J. R. S. for \$14,500, on divers lots in New York, and caused it to be recorded, without the knowledge or assent of J. R. S., as it was afterwards claimed.

On the 23d of August, 1839, Peter S. conveyed to the complainant Loomis, fourteen lots, including all those mortgaged to J. R. S. They were conveyed expressly subject to various liens, but not to the lien of J. R. S.'s mortgage. The consideration was a debt due from P. S. to Loomis and Lyman; both of whom knew of the judgment in favor of J. R. S.

On the 20th of September, 1839, J. R. S. for a nominal consideration assigned to Loomis, the bond and mortgage of Peter S. and the money due thereon. Loomis on receiving this signed a stipulation to J. R. S. reciting that they were assigned to enable him to perfect his title to three of the lots he had bought of P. S.; also reciting the judgment of J. R. S. as being a part of his demand against P. S. secured by the mortgage; and agreeing that the assignment of the bond and mortgage should not be deemed as cancelling the judgment or in any way impairing its force and validity against P. S., and that J. R. S. should have the same right to enforce the judgment against P. S. as if the assignment had not been made.

The assignment was recorded in October, 1839.

On the 25th of February, 1840, Loomis filed a bill in this court before the Chancellor, to foreclose this mortgage, and made Peter S., Joseph R. S., and others, defendants. A notice of the pendency of the suit was duly filed on the 2d of March, 1840. The bill was taken as confessed against J. R. S.; and the usual decree for a foreclosure and sale was made on the 3d day of August, 1841. This decree was duly enrolled, but there had been no sale of the premises under its provisions.

On the 20th of October, 1840, the Greenwich Bank sold to Joseph R. S., 600 shares of stock of the Hudson Fire Insurance Company, and received therefor an assignment of his judgment against Peter S. and Root. The bank knew of the mortgage,

and were assured it never had been accepted, and knew also of Loomis' purchase of the lots, but not of the assignment of the mortgage.

The bank proceeded to advertise and sell upon the judgment, the lots purchased by Loomis, and bid them in, and held the sheriff's certificate of the sale when this suit was commenced.

The bill charged that there was an agreement between Loomis and J. R. S. on assigning the mortgage, which prevented its becoming operative; that the mortgage never was delivered to or accepted by J. R. S.; that the decree on it was unduly and fraudulently obtained, and the bank has a full defence to the mortgage. It prayed that the mortgage be declared void, for an injunction against the execution of the decree, and that the judgment be declared a valid lien on the lots purchased by Loomis.

The answer denied the fraud and the agreement, and set up a good consideration for the assignment of the mortgage. It set forth the decree in the foreclosure suit, and insisted upon it as a bar against J. R. S. and against the bank claiming under him; and that the judgment and sale conferred no title upon the bank in respect of the mortgaged lots in question.

G. M. Ogden and W. H. Harison, for the complainants.

L. R. Marsh and S. P. Lyman, for the defendants.

THE ASSISTANT VICE-CHANCELLOR.—The allegation that the decree in the suit of Loomis against Stuyvesant and others, was unduly or fraudulently obtained, is not supported by any proof; and the complainants are entitled to no relief on that part of their bill.

The next important inquiry relates to their right to be heard in reference to the matters directly and inferentially settled by that decree.

Mr. Loomis filed his bill to foreclose the mortgage of Peter Stuyvesant in February, 1840. Joseph R. Stuyvesant was made a defendant, and a notice of the pendency and objects of the suit was filed in the county clerk's office, pursuant to the statute, on the 2d of March, 1840.

On the 20th day of October following, and during the pendency of that suit, the complainants purchased of J. R. Stuyvesant the judgment in question.

They cannot complain of want of notice of Mr. Loomis's claim. Aside from the effect of the *lis pendens*, they had actual notice that the mortgage was executed for the same debt which was secured by the judgment. If they had followed up that information by an examination of the records, they would have learned that it was not only executed but had been assigned by J. R. Stuyvesant to Mr. Loomis. And an inquiry made of him, or a search for notices of *lis pendens*, would have led directly to all the information which they now possess. They however relied upon the assurance of J. R. Stuyvesant or those acting in his name, that the mortgage had never been accepted, and they must abide the consequences.

This court is bound to treat the case precisely as if the complainants were fully informed of the pending foreclosure, when they received the assignment of the judgment. With or without actual notice, they were bound by the pending litigation into which they had purchased. Actual notice would have an important influence upon their efforts to be heard in the litigation.

I need not cite authorities to the point that a purchaser, *pendente lite*, will be bound by the decree in the suit; and that the complainant in the suit need not make him a party or otherwise notice his purchase. If he desires to defend the suit, he may make himself a party by a supplemental bill. (1 Daniell's Ch. Pr. 378; *Foster v. Deacon*, Madd. & Geld. 59.) And in an extreme case, it is probable that this might be done after decree. (See *Milspaugh v. McBride*, 7 Paige's R. 509.) But the circumstances of this case would scarcely warrant such leave after decree. The court refused leave to a complainant in *Pendleton v. Fay*, 3 Paige's R. 204, where it did not appear that she was ignorant of the matters sought to be set up in the supplemental bill, when she took her decree.

Mr. Loomis's bill was taken as confessed by J. R. Stuyvesant, after an ample opportunity to answer; and on the 3d day of August, 1841, he obtained a decree of foreclosure and sale, which establishes his title to the mortgage, and that the amount of it

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is due to him, and expressly forecloses J. R. Stuyvesant and all claiming under him, from all claim and demand to the mortgaged premises.

On the same day that this decree was made, the now complainants applied to the Chancellor by motion in the name and behalf of their assignor, to set aside the default against him, and be let in to defend. This motion was denied by the Chancellor.

In September, 1841, they moved the Chancellor in their own behalf, to be let in to defend the suit under the provisions of the act of 1840, relative to the foreclosure of mortgages in this court. The Chancellor held this motion under advisement, and ultimately denied it in December, 1843. But without awaiting his decision, the complainants filed this bill, in which they ask to have Mr. Loomis's mortgage declared void and inoperative, *ab initio*, that the judgment be declared a valid lien, and superior to his claim under the mortgage, and that the execution of the decree be perpetually stayed.

This certainly, is an anomalous suit. It is not in form or effect a bill of review, for that lies only after enrolment and for error apparent on the decree, or pre-existing matter which was discovered after the decree. Nor is it a bill in the nature of a bill of review, for that must be exhibited before the decree has been enrolled.(a)

If it belonged properly to either class, my impression is that the objections taken by the defendants because of the omission to obtain leave, and to make the deposit, &c., should have been presented at an earlier stage of the suit.

The attempt made by the bill, is to litigate anew the subject matter of the former suit, and by another decree virtually to set aside and annul the decree made by the Chancellor.

It appears to me that there are some insuperable objections to such a bill in this case. The Chancellor decided upon their last motion in the suit of Loomis against Stuyvesant, that the proper course of the Greenwich Bank was to have made themselves parties to that suit by a bill.(b)

(a) See *Hollingsworth v. McDonald*, 2 Harr. & John. 230.

(b) Now reported, 10 Paige's R. 490.

As that motion was for such other order as the court might deem proper to grant, I must consider the Chancellor's decision as being against granting the bank leave to file a supplemental bill.

Thus it is apparent that the present complainants were not entitled to pursue their supposed remedy, except by a supplemental bill making themselves parties to the former suit, and of course, while the suit was pending; and that they made the attempt to become parties after the decree, and their application was denied by the Chancellor. This of itself is decisive against the complainants' bill.

But if it were competent for the complainants to defend the former suit by a new one, in the manner here attempted, they meet with another formidable difficulty. In making the decree which they ask in their bill, I must wholly overthrow the decree made by the Chancellor in the former suit. His decree adjudges that the mortgage is a valid lien. I am asked to adjudge that it never was a lien. His decree declares that the whole amount of the mortgage debt is due to Mr. Loomis. The bank claims a decree in this suit that it is due and belongs to them. The Chancellor forecloses J. R. Stuyvesant, and also the Greenwich Bank under the designation of persons claiming under him subsequent to the commencement of Loomis's suit, from all equity of redemption and claim in the mortgaged premises. I am asked to decree on the contrary, that he had and the bank now has, a prior claim to the same premises.

This would just as directly and effectually discharge or reverse the Chancellor's decree, as if I should make an order to that effect in express words.

The statute positively forbids a Vice-Chancellor from discharging, reversing, or altering, any decree, order or act, made or done by the Chancellor. (2 R. S. 168, § 3.) Independent of any statute, such a proceeding by an inferior judge, would be so unseemly as well as repugnant to all notions of order, that it could never be upheld. There is no statute inhibiting the Master of the Rolls in England from such an act, and he used frequently to sit for the Chancellor; but Lord Eldon said in *Saunders v. King*, 2 J. & W. 429, that the Master of the Rolls

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never thought of altering or discharging the orders made by the Chancellor.

In *Lyon v. Merritt*, 6 Paige's R. 473, the Chancellor decided that he could not modify his own decree, where by an appeal and affirmance it had been made a decree of the Court for the Correction of Errors.

So between co-ordinate Vice-Chancellors. In *Astor v. Ward*, 3 Edw. Ch. R. 371, the Vice-Chancellor refused to modify or interfere with a decree made by my predecessor.

The statute creating the office of Vice-Chancellor of England, (53 Geo. III. ch. 24,) prohibited that officer from discharging reversing or altering, any decree, order, act, matter or thing, made or done, by any Lord Chancellor or Master of the Rolls. In the case of *Saunders v. King*, just cited, the Chancellor had made an order for a receiver. By consent, a motion to discharge that order was heard before the Vice-Chancellor, who decided that it ought not to be discharged, but at the same time made an order giving liberty to the defendants to propose themselves before the master as receivers. The Chancellor, on a motion to discharge the latter order, held that the Vice-Chancellor had no authority to make it, and he set it aside. He expressed his doubt whether consent of parties would give the Vice-Chancellor any authority to hear such a motion.

And in *Whitehouse v. Hickman*, 1 Sim. & Stu. 102, the same was decided by the Vice-Chancellor himself, on an application to vary an order made at the Rolls. (See also *Brooks v. Purton*, 4 Beav. 494; *Robinson v. Milner*, 5 ibid. 49; *Earl of Glengall v. Bland*, 1 Hare's R. 624.)

I am confident that I have no jurisdiction to make such a decree as is asked by this bill, or any other which would relieve the complainants.

The merits of the case were fully argued, and as my judgment upon them is made up, I ought not to withhold it in deciding the cause.

My conclusions will be stated very briefly. The assent of J. R. Stuyvesant to accept the mortgage is to be presumed from the facts. He knew of its execution, he did not expressly dissent, and it was for his benefit. It did not prevent his taking a judgment and thereby increasing the extent of his lien.

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The assignment of the mortgage is conclusive upon him and the bank deriving title to the debt from him subsequently, that he did accept the mortgage before his judgment became a lien.

The transaction in assigning the mortgage to Mr. Loomis was absurd and indeed inexplicable, unless the object were to enable him to use it to perfect his title to the mortgaged premises. It was undoubtedly supposed by the parties, that this could be accomplished without diminishing the debt secured by the mortgage, and the latter would remain by force of the judgment a lien on other lands of Peter Stuyvesant, just as available to J. R. Stuyvesant as if he had never assigned the mortgage.

The complainants therefore never acquired any right to enforce the debt against the mortgaged premises. They received the transfer of the judgment, in effect for a precedent debt, and with constructive notice of Mr. Loomis's rights. They are not therefore in a condition to rely upon the want of consideration in J. R. Stuyvesant's assignment to him. As to that consideration, the testimony is certainly confused, but I think that it is fairly proved to have been the advances which Loomis agreed to make for Peter Stuyvesant, on the faith of the property as represented to Loomis by Van Rensselaer.

Without regard to the consideration, the mortgage having been executed to secure the same debt, the judgment never could be enforced against the mortgaged premises. The bank did not buy the mortgage and they do not claim that the assignment of the judgment drew the mortgage with it. They stand upon the judgment, and have sold the premises under it. The law is positive that they thereby acquired no title. (2 R. S. 368, § 31; *Shottenkirk v. Wheeler*, 3 J. C. R. 275.) And it makes no difference that the judgment was not recovered on the bond accompanying the mortgage, so long as it was recovered for the debt secured by the mortgage. (*The North River Bank v. Rogers*, 8 Paige's R. 648; and *Shufelt v. Shufelt*, 9 *ibid.* 137, are analogous in principle.)^(a)

(a) To the same effect are the following cases since reported. *Loomis v. Stuyvesant*, 10 Paige, 490, before referred to, and *Delaplaine v. Hitchcock*, 6 Hill, 14.

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The Chancellor's opinion on the motion made by the bank in the former suit, although founded upon affidavits, and therefore not on the same testimony or identical facts as are now presented to the court, fully corroborates my conclusions upon the merits of the case.

On these grounds I think that the complainants are not entitled to any relief in this suit, and their bill must be dismissed with costs.

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Where the bill states a mortgage, apparently valid for the whole sum expressed in it, and then avers that it was given for a smaller sum previously advanced and also to secure future advances, the defendant cannot rely upon one of these averments as an admission in his favor and at the same time exclude the other.

A mortgage to secure future advances is valid. It is not necessary that such a mortgage should express that object on its face. It suffices that the extent of the intended lien be clearly defined. But the omission to state the object, renders the mortgage liable to suspicion, and imposes upon the mortgagee stricter proof of the payment of the consideration.

The policy of the registry laws, does not affect the question of its validity in this respect.

As between a mortgage to secure future advances, and a subsequent mortgage on the same premises for an existing debt, the latter is valid and takes precedence over all advances made upon the former, after such second mortgage is executed. But those made before that time, though after the first mortgagee knows of the intention of the debtor to execute it, are valid against the latter.

A prior mortgagee of lands, took further security by a mortgage of goods, and afterwards took possession of the goods. *Held*, that he had the option to sell them at auction and credit the proceeds on his debt, or to keep them and account for their market value; and having retained them, he was decreed to account for such value.

It is not a badge of fraud in a mortgage, that it was taken after the creditor learned of the debtor's intention to secure another creditor by a mortgage on the same land.

A settler on lands of the United States, entitled to pre-emption, has no title or estate in the land, which he can sell or incumber. He has simply a right to become the purchaser at the minimum price of the public lands, in preference to

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all others ; and the right is forfeited, if when the land is offered for sale, he is unable or unwilling to pay that price.

Where on a bill and cross bill, each party claimed more than he was entitled to, but the complainant in the original suit mainly succeeded ; he was allowed his costs of that suit out of the fund, and all the other costs were directed to be borne by the respective parties who incurred them.

April 18, 23, 24 ; August 17, 1844.

THE case came before the court on an original bill filed by John Craig to foreclose a mortgage executed to him by Hugh Graham and wife, and upon a cross bill exhibited by Tappin, a subsequent mortgagee of the same premises. Craig's mortgage was dated May 1, 1839, and was conditioned for the payment of \$18,000 in five years with interest half yearly, according to Graham's bond of the same date. It conveyed divers lands in the city of New York, was acknowledged in Illinois where the grantors resided, on the 24th of December, 1839, and was recorded January 21st, 1840. The bill filed by Craig, after stating the due execution and delivery of the bond and mortgage, alleged that the mortgage was given to secure him for moneys previously advanced to Graham and for other moneys which he agreed to advance, from time to time ; and it set forth in a schedule the dates and amounts of all such advances. The testimony sustained the bill in this respect. A part of the amount claimed, was paid by Craig to Graham after the 15th of January, 1840, on which day Graham and wife executed a mortgage on the same lands to John Tappin for \$4640, which was acknowledged March 16th, and recorded April 7, 1840.

On the 4th of April, 1840, Graham, who was then in the possession of about seven hundred acres of government lands at Dixon's Ferry, in the state of Illinois, and of a large quantity of movable property there, executed to Craig a mortgage on both the lands and the personal property, reciting an indebtedness of ten thousand dollars to Craig, and conditioned to pay it on the fourth of June ensuing. This was confessedly for the same debt, or a part of it, which was secured by the first mentioned mortgage. When the Illinois mortgage fell due, Craig took possession of the personal property and retained it, claiming it as his own, as long afterwards as 1841. It was worth about \$2000 when the mortgage became payable.

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When the government lands came to be offered for sale, Graham neglected to become the purchaser, and they were bought by some member of his family, at the minimum price of the public lands. Craig never obtained any thing by means of his Illinois mortgage, except the personal effects mortgaged.

Craig knew of Graham's intention to secure Tappin's debt by a mortgage, before his own was actually executed and delivered.

The answer of Tappin and the cross bill sought to impeach Craig's mortgage on the ground of fraud in various particulars. Tappin also claimed that it was invalid because the intention to secure future advances was not expressed in it; and that at all events, it was not good for advances made after Craig knew of Graham's intention to mortgage to Tappin. He further insisted that Craig was bound to account for the whole value of the Illinois lands mortgaged, as a payment towards his debt, as also for the value of the goods and chattels included in that mortgage, alleging that Craig became the absolute owner of the whole early in 1841, and that the same were worth \$10,000 to \$12,000.

There were numerous other matters presented by the pleadings and proofs, which it is not deemed necessary to notice, and so much of the judgment of the court as related to those matters, is omitted.

R. S. Waller and S. G. Raymond, for Craig.

Charles Taylor, for Tappin.

THE ASSISTANT VICE-CHANCELLOR.—The answer to the cross bill being evidence in the cross suit, I think that Tappin's case stands quite as favorably for him in the original suit, as it does in the cross suit, or in both combined. I will therefore consider the case at large as it is presented by the pleadings and testimony in the original suit.

Fraud constitutes the principal ground of defence, and in support of it there are several distinct evidences relied upon.

First. The mortgage expresses a consideration of \$18,000, when it is said there was not much more than a third of that sum due at the time it was executed, and but \$10,000 was due

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according to Craig's own showing. Craig's account of it is, that the mortgage was given to secure advances already made and money to be advanced from time to time. He comes into this court with a bond and mortgage valid presumptively, for \$18,000; but he says that in fact they were given for both past and future advances, and there never was but about \$13,000 advanced.

Now the defendant cannot lay hold of this admission that only \$13,000 was advanced, and say to the complainant, you must prove the rest of your story that the mortgage was given to secure future advances.^(a)

The testimony from Illinois as to what Craig said of his advances, aside from the statement in the bill, would be referred to the mortgages executed in that state. And I believe there is no other evidence in the original suit, which proves that the whole mortgage debt was not at some time advanced. If reference be made to the cross suit, we encounter Craig's answer as to the consideration, which is responsive to the bill.

The testimony of Mr. Young favors the allegation in the original bill as to the future advances. It shows that the land which was subsequently mortgaged, was regarded by all the parties as the fund from which Craig was to be reimbursed; that the principal advances were made upon the faith of this fund; and that efforts were made to sell the land, which were ineffectual. Then Craig's mortgage was given, and the advances were still continued.

The fact must be taken as established, that the mortgage was intended to secure future, as well as precedent advances.

Then as to the amount which Craig claims that he had advanced when the mortgage was executed. Is his allegation in that respect untrue, and his claim therefore fraudulent?

The evidence, instead of showing its falsity, proves that almost the entire sum was advanced. Objections were made to the testimony of Mrs. Graham's transactions, but I think without cause. She was the agent of her husband; her acts were his;

(a) See *Russell v. Kinney*, 1 Sandford's Ch. Rep. 34, which case was affirmed by the Court for the Correction of Errors in December, 1845.

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and he ratified them by executing the mortgage. So, as to the moneys paid to Mr. Young for Graham. The contents of the power under which Young acted, need not be shown in order to sustain an advance made to him as agent, sworn to be for the benefit of the principal, and subsequently ratified by him.

Although the burthen of proof was not upon Craig, he has proved nine-tenths of the amount which he charged in his bill as having been advanced prior to the execution of the mortgage, and all of the subsequent advances which are material in this case.

Thus there is no fraud shown in the consideration of the mortgage as set up by Craig. So far, it appears to have been executed in good faith, unless the omission in the mortgage itself, to state that the whole sum had not been advanced, sustains the imputation of fraud.

It is no longer a question, that mortgages to secure future advances, are good to the extent secured thereby.(a) But it is insisted that the intention must be expressed in the mortgage, or else it is fraudulent and void as against creditors; and that the policy of our registry laws requires this, for otherwise the record will never disclose the extent of the existing incumbrances.

The reason assigned may be a strong argument against sustaining liens for contemplated advances in any case; but that point having been passed, the force of the reason appears to be spent. If in this instance the mortgage had stated that it was designed to secure future advances, the subsequent creditor or incumbrancer would obtain no useful information from that statement. So in any case, the record would afford him no certainty. His only resource would be an application to the mortgagee, to ascertain the extent of the advances already made; (a statement which the latter would be bound to furnish truly;) very much as in an ordinary transaction, when finding a large lien before him, he would inquire of the creditor whether all or how much of it was due.

The only authority to which I was referred, that in any re-

(a) See *Lansing v. Woodworth*, Vol. 1st, page 43.

spect sustains Tappin's ground on this point, is an expression of my learned predecessor in *Walker v. Snediker*, 1 Hoff. Ch. Rep. 146, where he says that the better opinion if not the decided law is, that a mortgage to secure future responsibilities must express the object, and that it is certain that such mortgage cannot be rendered available for future liabilities by a subsequent parol agreement. At the same time, he says that such a mortgage if it be not a security for future advances, is not made void for the amount truly due and the liabilities then existing; and he quotes the strong language of Chief Justice Marshall to that effect in *Shirras v. Caig*, 7 Cranch, 34.

If by future responsibilities, the late Assistant Vice-Chancellor had in view future advances pursuant to an agreement cotemporary with the mortgage, I cannot assent to the whole of his proposition. I will first observe upon the cases to which he refers. The first was *Ex parte Hooper*, 1 Meriv. 7, in which Lord Eldon decided that a mortgage for £400 could not, in pursuance of a parol agreement made long afterwards that it should stand as security for a further balance of £400 on account, tack the last sum to the first and hold the mortgage as a lien for £800 as against other creditors.

The next case is *Hendricks v. Robinson*, 2 J. C. R. 283, in which Chancellor Kent held that an assignment of personal property by an insolvent, to secure future advances and responsibilities as well as existing engagements, is valid if made in good faith.

In *James v. Morey*, 2 Cowen, 246, (S. C. 6 J. C. R. 417,) Morey claimed under a deed, absolute on its face and expressing a consideration of \$10,000, but which was intended as security for a note of \$5000, on which Morey was an indorser, and for indemnity against a bond which he had executed as surety for the grantor. This was held valid as a mortgage, both by Chancellor Kent, and by the judges who delivered opinions in the Court for the Correction of Errors; although the decision in that court was adverse to Morey on other grounds. His attempt to make the deed a security for other demands was overruled, as the same thing was in *Ex parte Hooper*. But the opinions delivered in *James v. Morey* in both courts, are full to the point

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that the deed was a valid security for all the matters covered by the parol agreement between the parties when it was made.

In *Dirver v. McLaughlin*, 2 Wend. 596, a mortgage of goods for \$800 when there was but \$100 to \$150 due, and where there were other badges of fraud, was held to be fraudulent. The absence of a statement in the mortgage that it was also to secure future advances, was commented upon by the Chief Justice, with many other circumstances, but he does not say that this omission is of itself essential; and there were other abundant evidences of fraud in the case.

Two cases in the Supreme Court of the United States were also cited in *Walker v. Snodiker*. *The United States v. Hooe*, 3 Cranch, 73, was one, and in that case as the mortgage recited its object, the point under consideration did not arise. The other case was *Shirras v. Caig*, before cited, which appears to me to be an authority on the other side of the question. There the mortgage purported to secure a debt of £30,000 due to all the mortgagees. In fact it was intended to secure different sums due at the time to various persons among the mortgagees, advances thereafter to be made, and liabilities to be incurred to an uncertain amount. And it was objected that the whole transaction was totally variant from that stated in the deed. The court nevertheless held it to be valid. Chief Justice Marshall says that such a deed is liable to suspicion, but if on investigation the transaction turns out to be fair, it would be unjust to deprive the mortgagee of his real equitable rights, unless it be in favor of a person who has been in fact injured by the misrepresentation made by the deed.

I think, therefore, I may say that there is no authority for holding that a mortgage to secure future advances, must express that object in order to be valid.

I will refer to a few other cases. In *Brinckerhoff v. Marvin*, 5 J. C. R. 320, 326, the object of the judgments, which were to secure future as well as existing indorsements, was expressed in receipts given, and so far as notice to creditors or purchasers was concerned, might as well have rested in parol. Nevertheless they were held to be valid. Chancellor Kent said "A judgment

or other security may be taken and held for future responsibilities *to the extent of it*; and he cited *Shirras v. Caig*.

In *St. Andrew's Church v. Tompkins*, 7 J. C. R. 14, the prior mortgagee attempted to extend his mortgage as against a second mortgagee, so as to embrace interest, which was not expressed in it, but which the mortgagor agreed to pay. The Chancellor decided that it could not be done, and I think expresses the true principle on the subject. He says, "it is the policy of the registry act that a subsequent incumbrancer should be able to ascertain with certainty, *the extent* of the prior incumbrance," and that moneys not mentioned in the prior mortgage, cannot be covered by it to the prejudice of subsequent liens.

In other words, the mortgage or judgment must show on its face and by the record, the utmost amount or sum which they are intended to secure. Not that the record must always show, or was ever intended to show, how much was actually due or unpaid on any judgment or mortgage.

So Chancellor Kent, in his Commentaries, (Vol. 4, p. 175, 176, 2d ed.) lays it down that a mortgage or judgment may be taken and held as a security for future advances and responsibilities, *to the extent of it*, when this is a constituent part of the original agreement. He also says that the record of the lien should give the requisite information as to the extent and certainty of the contract, so that a junior creditor may, by inspection of the record and by common prudence and diligence, ascertain the extent of the incumbrance. I should have mentioned, that in *Livingston v. McInlay*, 16 Johns. 165, where the Supreme Court sustained a judgment by confession to secure future advances, the bond was in the penalty of \$4000 with a condition for the payment of \$2000. There was only \$1118 due when it was given, but there was a verbal agreement for future advances, and a written promise by the creditors to issue execution for no more than was due.

The case of *Lyle v. Ducomb*, 5 Binney, 585, was similar in principle to *Shirras v. Caig*. The mortgage was made by Ducomb for the payment of \$9000 on demand. On the back of it, forming no part of the instrument and not recorded, was an agreement that it was to secure Lyle and others from loss by notes

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given and to be given by them for Ducomb's accommodation. Subsequently and after another lien had intervened, the agreement was varied, so as to cover indorsements as well as notes drawn for Ducomb. The court held it a valid mortgage and a prior lien to the extent of the \$9000 for both classes of notes; the difference between drawing and indorsing, being deemed matter of form, and working no prejudice to other creditors.

In *The United States v. Sturges*, 1 Paine's C. C. R. 525, the mortgage was for the absolute payment of a specified sum, but was intended as indemnity for signing custom house bonds as surety for the mortgagor. It was upheld for that purpose, against the wishes of the parties to the mortgage, who desired to use it as an absolute lien for the payment of the sum expressed.

The defendant's counsel referred me to a series of decisions on this subject in Connecticut. In *Pettibone v. Griswold*, 4 Conn. R. 158, the condition of the mortgage was to pay a note of \$4000, and to pay all other notes the grantee might indorse or give for the grantor. The consideration expressed was \$4000. The court held that the condition was too indefinite; that it did not give reasonable notice of the incumbrance on the land mortgaged.

The same principle was asserted in *Stoughton v. Pasco*, 5 Conn. 442, but with a different result. There a trustee who was bound to account to a creditor and owed him an indefinite sum then unascertained, gave him a mortgage conditioned to pay the trust indebtedness describing it, but specifying no amount. It was upheld as a good lien for the amount subsequently ascertained to be due. Chief Justice Hosmer said that the policy of the recording laws does not require that perfect and complete notice should be given without any inquiry *dehors* the record. That in equity, the notice is sufficient which presents a certain object concerning which successful inquiries may be made without unreasonable inconvenience. In *Shepard v. Shepard*, 6 *ibid.* 37, the mortgage was to secure an indorsement of \$800 and future indorsements if asked, not exceeding \$1200. This was held defective as to the latter, because it was perfectly indefinite as to time and subject matter.

On the other hand in *Hubbard v. Savage*, 8 Conn. 215, the

condition of the mortgage was to pay a note of \$1000 which the grantee had indorsed at the Middletown Bank, and \$1000 in a note or notes thereafter which the grantee had agreed to indorse when requested; and it was held valid for the whole \$2000.

In *Booth v. Barnum*, 9 *ibid.* 286, the principle was adopted, that a mortgage debt must be described with sufficient certainty to enable subsequent creditors and purchasers to ascertain either from the condition of the deed, or inquiry *aliunde*, the extent of the incumbrance. There the condition described one debt as of \$30 or thereabouts, and the other as of \$40 or thereabouts, when in fact the one was \$25 21, and the other was \$59 66. It was held sufficient.

In *Hart v. Chalker*, 14 *ibid.* 77, the condition described the debt as due by note dated on a certain date and payable on demand with interest, without specifying the amount. This was held insufficient. The Chief Justice says if a mortgage is given to secure a debt not ascertained, such *data* must be given respecting the debt as will put any one interested in the inquiry, upon the track leading to a discovery.

These decisions in Connecticut, as a whole, sustain the position that the mortgage need not express that it is to secure future advances, or present or future indorsements; but it must exhibit *the extent of the lien* intended to be created; and this with an inquiry from the mortgagee as to the amount due, will furnish all requisite information to parties interested. My examination of the authorities therefore confirms me in the view with which I set out. By the mortgage in question, when recorded, all the world had notice that Craig had a lien which did or would amount to \$18,000. This gave to all, information of the *extent of the contract*; and then by the use of the ordinary diligence and prudence of inquiring of the mortgagee, any person interested could have ascertained the *extent of the incumbrance*. If Craig had advanced \$18,000, Tappin on endeavoring to secure his debt, would have been driven to precisely the same inquiry; for in that case as well as where there is to be a future advance, the record alone would give no information of the existing or actual extent of the incumbrance.

I must therefore hold that a mortgage intended to secure future

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advances, need not express that object in the mortgage itself. It would be better to state such object in the mortgage, and when it is not stated, the mortgage will be liable to suspicion, and the holder put upon stricter proof of the payment of the consideration ; but its omission will not render the security invalid.

Another charge of fraud is made because Craig knew of Graham's intention to mortgage the same premises to secure the debt of Chartres or Tappin.

One witness testifies that Craig knew of this intention prior to the execution of the mortgage to him, but not that Graham was urged or pressed to complete it. Such knowledge was well calculated to stimulate Craig to secure his own debt, and it would have been surprising if he had failed to make the attempt. Having made it and succeeded, the act is to be attributed to his desire to save his debt, not to a wish to hinder and delay Tappin. The motive was selfishness, not malice or ill will ; and it was entirely proper, although the direct and necessary result of his obtaining security, was to prevent Tappin from collecting his debt.

I do not perceive how the attachment proceedings stated in the cross bill, could have changed Tappin's position. The mortgage to Craig was delivered in December, and took effect from that time as against the attachment.

Again, the mortgages of Graham's personal and real estate in Illinois, taken by Craig, are alleged to be fraudulent, and to furnish evidence of a fraudulent intent in the previous mortgage to Craig, inasmuch as it discloses a design to cover the whole of Graham's property and place it beyond the reach of his creditors. That within a few months after taking a mortgage on property here for \$18,000 as the limit of the debt, Craig with only \$11,000 due to him thereon, obtained a mortgage in Illinois for further security.

We have no evidence as to the value of the mortgaged premises here in the years 1838 and 1839, when the advances were made by Craig ; and it therefore does not appear but that they were worth the \$18,000 expressed in the mortgage. It was not denied that in the subsequent depreciation of real estate in this city, they became worth much less than the amount due to him in December, 1839.

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It is no uncommon thing for a creditor to overrate the value of the security offered to him, and on discovering his error, to grasp all the additional security which he can coax or coerce from his debtor. And I am not prepared to say on the testimony before me, that Craig acted from any worse impulse than this, in taking his Illinois mortgage in April, 1840. The security obtained was not very extensive. Graham's real estate was no estate at all. He had settled upon government land, and improved it, and had thus become entitled under the acts of Congress, to purchase it at the minimum price, whenever it should be offered for sale by the government. This mere right he could not incur. The pre-emption act of 1828, revised in 1838, declares, that all assignments and transfers of the right of pre-emption given by that act, shall be null and void. And the act of 1838 requires the claimant of the benefit of the law, the actual settler, to make oath that he has not directly or indirectly made any agreement or contract whatever, by which the title which he might acquire from the government of the United States should enure to the use or benefit of any one except himself. (Laws of the U. S. 1828, ch. 434, § 3; 1838, ch. 119, § 1; Continuation of Bioren's Edition of Laws of U. S., Vol. 8, p. 375; and Vol. 9, p. 801.)

The Supreme Court of Illinois decided in *Davenport v. Farrar*, 1 Scammon's R. 314, that a pre-emption right is not an estate of which a widow can be endowed. They say that it is a mere right to purchase the land in preference to others, and if the pre-emptioner is either unable or unwilling to purchase at the time mentioned in the law, the land can be sold to others, and he turned out of possession as an intruder.

So in this case, the right itself was extinguished, for on the lands being brought into market neither Graham or Craig became the purchaser.

The personal property mortgaged was worth \$2000 in 1840, and afterwards a much less sum.

I do not see the evidence of fraud against the Illinois creditors, which Tappin's counsel discerned so clearly. The debt was due to Craig. It was not adequately secured here. Craig was living on the land there, and in two or three months after,

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claimed the property as mortgagee in possession, and maintained that claim as to the chattels, in a suit at law there. This does not appear to be fraudulent against creditors.

After an attentive examination of the various charges of fraud brought against the mortgage in question, I have come to the conclusion, that they do not successfully impeach the mortgage, and that it must be upheld.

The next inquiry is as to the extent to which it is to be carried as a prior lien to Tappin's mortgage.

It is contended by Tappin, that as against his, Craig's mortgage is good only for the amount which had been advanced up to the time when Tappin's mortgage was agreed upon. I think the true period is the time when the latter mortgage was executed. (See *Brinckerhoff v. Marvin*, 5 J. C. R. 327; per Chancellor Kent.)

The amount of Craig's advances when the mortgage to Tappin was executed, were \$10,361 04, with interest from the dates of the advances as set forth in the schedule annexed to the bill, except that the two first items should not bear interest prior to October, 1834.

The testimony of Craig's declarations in Illinois, which were proved by Tappin for another purpose, confirm the other proof as to the amount which Craig had advanced to and for Graham.

Then we have the point that Craig at all events must account for the value of the Illinois property at the time it went into his hands.

As to the real estate, if there were in truth any estate, the only account would be of the rents and profits, there never having been any foreclosure of the mortgage. But as I have mentioned, Graham had but a mere right of pre-emption, and the title passed very soon into other hands. There will be no accounting for the real estate. As to the personal property in Illinois, the case is wholly different. Craig took the possession of it by virtue of his mortgage. He had a right to keep it and account for its market value, or to sell it at auction and credit the net proceeds upon his debt. He pursued the former course, and he must account accordingly. He is entitled however to be allowed in this accounting for the money which he advanced to Graham

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after the execution of Tappin's mortgage, and before the date of the Illinois mortgage. The parties may go before the master on the subject of the value of the personal property mortgaged at the time that mortgage became due, unless Craig elects to account for it at the sum of \$2000 which is the value put upon it by the witness William W. Graham.

The complainant in the first suit is entitled to a decree accordingly, and the cross bill must be dismissed.

Each party has claimed more than he was entitled to, and I will dispose of the costs by giving to Craig his costs of the original suit out of the fund, and will leave all the other costs to be borne by the respective parties who incurred them.

TOLLEY v. GREENE and others.

Where a husband gave to his wife by will, in lieu of dower, *a decent and comfortable support and maintenance out of his estate in sickness and in health during her lifetime*, leaving the residue of his property to his two children, it was held that such allowance was not to be measured by the sum requisite to support her in a boarding house; but that she should have sufficient to maintain her in house-keeping at the place of her residence, and in the manner to which she had been accustomed while living with her husband; it appearing that the sum necessary for such a maintenance was less than the interest on one-third of the testator's estate.

Although an agreement which *may* be performed within a year, is not within the clause of the statute of frauds respecting contracts not to be performed within that period; an agreement which cannot be performed within a year, except upon a contingency, which the parties could not hasten or retard, as the death of some person, is *not* within the statute. And the possibility of performance which withdraws a case from the force of the statute, must rest upon human effort or volition, and not upon providential interference. *Semble*.

May 10, 11; August 19, 1844.

THE bill in this cause was filed by the widow of William Tolley, late of Athens, in the county of Greene, and the suit was heard on pleadings and proofs.

W. Tolley by his last will and testament left two-thirds of his property to his son Frederick W. Tolley, and one-third to his

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daughter Altenah S., who became the wife of Samuel Wescott; subject to a provision for his wife which was in these words:

"*First.* It is my will and order that my beloved wife Rebecca have a decent and comfortable support and maintenance out of my estate in sickness and in health, during her lifetime, in lieu of her dower right which she might claim out of my estate. I also give and bequeath to my said beloved wife all such goods and chattels as she brought with her when she came to reside with me and such as she has purchased with her own money."

W. Tolley died in 1836, and his son who was his sole executor, died in 1842.

The bill was filed against Wescott and wife, and the administrators of F. W. Tolley, and sought to have a sufficient sum set apart and secured for the complainant's support and maintenance for life according to the bequest in the will of W. Tolley, alleging that she had accepted the provision made for her by the will in lieu of dower.

The defendants set up an agreement made by the complainant with Wescott and F. W. Tolley in 1837, by which she was to receive \$210 a year during her life, in full of her claim and right for a support under the will; and the principal litigation was in reference to the making of that agreement. The report of the case omits all of the opinion which related to that question.

J. Van Vleck, for the complainant.

H. Hogeboom, for the defendants.

THE ASSISTANT VICE-CHANCELLOR.—William Tolley, by his last will and testament, gave to his wife, (the complainant,) in lieu of dower, a "decent and comfortable support and maintenance, out of his estate, in sickness and in health, during her lifetime." He gave all the bulk of his estate to his son Frederick and his daughter who is now the wife of Wescott; two-thirds to the son, and one-third to the daughter. The son was his executor. The complainant has never claimed her dower, and is

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entitled to the provision made for her by the will, unless she has done some act which precludes her from asserting her claim.

The defendants state in their answer, that on or about the fourth day of February, 1837, the complainant of the one part entered into an agreement with Frederick W. Tolley and Wescott, acting for himself and his wife, of the other part, that she would receive, and that they would pay to her at and after the rate of \$210 a year during her life, in lieu and full satisfaction of her claim for and right to a support and maintenance under the will, to be paid to her at such times and in such sums as she should desire; of which sum Frederick was to pay two-thirds and Wescott the remainder. The existence and effect of this agreement, are the most important questions in the cause.

(The Assistant Vice-Chancellor then examined the evidence on this point, and thus stated his conclusions:)

Upon the whole testimony I feel perfectly satisfied that the agreement set up in the answer is not sustained by the proofs, and that the complainant is entitled to the provision made for her by the will.

This conclusion relieves me from the necessity of deciding whether the agreement, if proved, was not void by the statute of frauds. It is settled that a parol agreement which *may* be performed within a year, is not within the statute. But I believe that there is no reported case which decides that a contract which cannot be performed within a year, except upon a contingency which neither party nor both together can hasten or retard, such as the death of one of them or of a third person, is not within the statute. The possibility of performance in the adjudications, rests upon human effort or volition, not upon providential interference. (*Fenton v. Emblers*, 3 Burr. 1278; *Wells v. Horton*, 4 Bing. 40; *Moore v. Fox*, 10 Johns. 244; *McLees v. Hale*, 10 Wend. 426; *Plimpton v. Curtis*, 15 *ibid.* 336; *Lockwood v. Barnes*, 3 Hill, 128; *Artcher v. Zeh*, 5 *ibid.* 200; *Russell v. Slade*, 12 Conn. 455; *Blake v. Cole*, 22 Pick. 97.)

The annual amount which is to be paid to the complainant should be ascertained in this suit.

The defendants have presented but little testimony on the sub-

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ject, and they insist that there shall be a reference to a master to inquire and report the proper amount.

It is now two years since they have paid any thing to the complainant, and as she is wholly dependent upon the provision in the will, I am admonished that there ought to be no further delay in disposing of the controversy than is absolutely necessary.

From a careful examination of the testimony, I believe that there is sufficient material furnished on both sides to enable the court to fix the annual support with justice to the parties. It is evident that the contest as to the amount will turn principally on the question whether a suitable provision is to be made to enable the complainant to keep house in the village where she resides, or whether she is to be restricted to living at board in the same village or in a country town. Upon this point, I can have no hesitation. She was the wife of W. Tolley for about 13 years, living plainly, but in a good house, and with comfortable appendages. Her husband left only two children, who inherited some \$35,000, subject to the support of his wife. If he had died intestate, she would have received absolutely a principal sum larger than that on which she now asks merely the interest for the rest of her life.

It is not reasonable under such circumstances that this infirm old lady should be compelled to pass the remainder of her life in a boarding house; restricted in room and in comforts, and indeed in what is necessary for her due support in sickness, by the stinted allowance mentioned in the defendant's testimony. I do not believe that W. Tolley would have thus limited her, if he could have anticipated the existing state of things.

Considering her station and mode of life, both before and after her marriage with W. Tolley, and the amount of his estate, I think she is entitled to be supported and maintained in house-keeping in a plain and economical manner, at the place of her residence.

The witnesses furnish sufficient *data* to warrant me in deciding upon the amount to be paid to her on this basis, and in my judgment, Dr. Pierce's estimate of \$600 yearly, is a reasonable

and just allowance. This is about fifty dollars less than the average of the estimates made by the complainant's witnesses.

To secure the payment of this sum yearly during the complainant's life, the defendants must pay to the register of this court, or transfer to him securities, sufficient to yield an annual interest of \$600, for her benefit. Or if they prefer it, they may purchase for her a life annuity of that amount from The New York Life Insurance and Trust Company.

The defendant Wescott, as between himself and the representatives of F. W. Tolley, must bear one-third of the requisite payment.

The defendants must also pay to the complainant at the same rate for the two years which have elapsed, since any payment was made to her. In effecting the deposit of securities with the register, the complainant is entitled to consider as unadministered such of the securities formerly belonging to W. Tolley, as remained in the hands of F. W. Tolley's representatives when this suit was commenced, and to have the same transferred to a sufficient amount to secure her annuity.

The defendants must also pay the costs of the suit; two-thirds are to be borne by the estate of F. W. Tolley, and the remaining third by Wescott. Although no demand was made of Wescott, yet the ground set up in his defence shows that it would have been wholly unavailing.

Decree accordingly.

Tucker v. Clarke.

TUCKER and others v. CLARKE.

The court of chancery does not interfere, by way of decreeing specific or further performance, with executed agreements.

Where parties supposing that they were seised, sold and conveyed lands, with covenants of seisin and warranty, to which as it subsequently appeared, they had no title; and six years afterwards, on being sued by their grantee on the covenant of seisin, purchased the lands of the true owners, and tendered a new conveyance thereof to the grantee, who refused to accept it;

Held, that the court had no power to compel the grantee to receive the deed, or to interfere with his action on the covenants of title.

June 11; August 19, 1844.

THIS was a bill in the nature of a bill for the specific performance of an agreement. The facts, which were material to the point reported, sufficiently appear in the judgment of the court.

M. S. Bidwell, for the complainants.

W. Silliman, for the defendant.

THE ASSISTANT VICE-CHANCELLOR.—The bare statement of this case suffices to show that the complainants have no equity.

The complainants in February, 1835, sold and conveyed to the defendant in fee, with full covenants of title, six lots of ground in Brooklyn. They supposed they had a good title, but in fact had no title to any of the lots.

On this being discovered in 1841, the defendant sued the complainants at law upon the covenant of seisin in his deed, and they thereupon tendered to him a good title, (as they allege) together with the costs which he had incurred. He declined to receive the conveyance, and they filed this bill to compel him to accept it and stay his proceedings on the covenant.

The only contract there ever was between the parties, was that made by the deed in 1835, which is a contract executed and performed. There never was any valid executory contract which was to be performed at some future time. The complainants therefore do not ask the court to compel a specific performance

of an open agreement. They ask to compel the defendant to give up his claims under a deed executed seven years before the bill was filed.

The executed contract was, that the complainants were seised of the lots, and if they were not, that they should repay the consideration money. This is sought to be reconsidered and turned into a contract by which, if it should ever turn out that they were not seised, they might either repay the consideration or procure a good title to be conveyed. It would, have been a little more plausible if there were a semblance of mutuality about it, so that the defendant might have coerced them to procure a good title on discovering the defect. But there is no pretence that the defendant had any such equity. The complainant's ground amounts to this: If the lots had become worth two or three times the price which the defendant paid for them, then they could set up the outstanding title, deprive the defendant of his speculation, and throw him upon the covenants in his deed, which would restore to him the consideration paid. If on the other hand, the lots should depreciate very much, the complainants would procure the outstanding title for him and retain the price which he paid. There is no equity or fairness in this, and the court cannot grant the relief prayed by the bill, without first making such a contract for the parties; a contract which they never did make, and I presume never would have made, if any failure of title had been supposed probable when the conveyance was executed.

The bill must be dismissed with costs.

WESTERVELT v. HAFF and others.

A mortgage executed by a tenant in common of lands, pending a suit in this court for their partition, becomes a lien on his interest in the land.

If the suit terminates in a decree for a sale, and a sale ensues at which the mortgagor becomes the purchaser of a part of the lands, and on receiving a deed is allowed towards the amount bid for his share of the proceeds of the whole premises, and omits to pay off the mortgage, it still continues to be a lien as against such mortgage, upon the land bought by him at such sale.

And a mortgage executed by him after the sale, for a precedent debt, to one who relinquishes no security or value therefor; will be subject to the lien of such prior mortgage, to the extent of the mortgagor's original interest in the proceeds of the lands held in common. So if after the sale, the mortgagor executes a mortgage to one who has notice of the existence and non-payment of the mortgage given pending the partition.

Notice to the solicitor of such subsequent mortgagee, who prepares the securities in his behalf, is notice to the client.

A stranger purchasing at such a sale and paying the price, without notice of the mortgage executed *pendente lite*, would be protected against the mortgage.

C. owning lands in New Jersey, subject to a mortgage to W. for \$4000 sold a part of the same to H., for a sum equal to the mortgage; and H. agreed to pay W. \$1000 of the price, and to mortgage to him the part so bought, for the residue. Instead of paying the \$1000, H. gave to W. a mortgage therefor, on lands in New York, and then mortgaged to him the lands bought of C. for the whole \$4000; payable in four years; upon which W. discharged C.'s mortgage. The mortgage for \$1000 was payable in one year, and as expressed in it, was collateral to the other. The New Jersey lands were not worth the \$4000.

Held, 1. That the mortgage for \$1000 was not in fact collateral to the other. 2. If it were, that it could be collected when due, without waiting for the other to mature. And, 3. When the remedy on the principal mortgage is manifestly inadequate, the collection of the collateral security will not be postponed till the former has been exhausted.

June 12, 13; August 20, 1844.

THIS was a bill to foreclose a mortgage executed by John P. Haff to the complainant to secure his bond for \$1000. The securities were dated May 17, were executed on the 28th of September, and were recorded November 15, 1841. The mortgage was expressed to be made as collateral security to one of \$4000 executed by Haff to the complainant on a tract of land in Bergen county, New Jersey. The circumstances respecting the latter mortgage are stated in the decision.

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The premises conveyed by the mortgage in question, were an equal undivided ninth part of five houses and lots at the corner of Prince and Macdougall streets, in the city of New York. At the time the mortgage was executed, there was a suit for the partition of those lands pending in this court, in which Haff, his mother Abigail, and the other tenants in common of the houses and lots, were parties. A notice of the pendency of the suit had been filed, pursuant to the statute, and the complainant knew that it was in progress. Mr. Elting the solicitor who prepared the securities executed by J. P. Haff, was the solicitor and counsel for his mother in the partition suit.

The suit proceeded to a decree for the sale of the whole premises, which was entered on the 12th day of October, 1841, and the same were sold by one of the masters of this court, on the 27th of November following. J. P. Haff became the purchaser on his own account of two of the houses and lots at the sale, viz. numbers 185 Prince-street and 38 Macdougall-street, for \$4975. His own share of the proceeds of the whole sale in partition, was \$1901 44, from which the decree made some deductions, leaving to him about \$1600 as his interest in the property, which belonged to him in the sum payable upon his bids. For the residue of his bids he executed two mortgages, one to H. Walworth, the clerk of this court, (in behalf of certain infant owners for whom he was guardian *ad litem*,) for \$1901 44, on 185 Prince-street; and the other to F. W. Speck for himself and wife, the latter being one of the tenants in common, for \$1500, on 38 Macdougall-street. Upon his completing his purchase in this manner, the master conveyed the two houses and lots to John P. Haff. At the same time this was closed, and on the 9th of February, 1842, J. P. Haff mortgaged both lots to his mother, Abigail Haff.

This was done to secure a precedent debt which he owed to her, and an existing liability incurred by her for him some time previously. All these securities were prepared by Mr. Elting, and were completed in his office, for which purpose Mrs. Haff, J. P. Haff, and various other parties in the suit, met there. The complainant's lien was mentioned and discussed in Mrs. Haff's presence, but one of the advisers of the parties declared it was not a lien upon the land. The complainant did not present his

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mortgage to the master after the sale, or make any claim upon the fund until after the master had closed the sale and made his report.

The complainant in his bill alleged that by force of the sale and purchase by J. P. Haff, his mortgage continued to be a lien, and was prior on both the lots bought by him, to Mrs. Haff's mortgage, and that she had actual notice of his lien. He admitted that the mortgages to Speck and the clerk of the court, were prior in right to his own, being in effect given for the purchase money, *pro tanto*.

All these mortgagees were made defendants. Mrs. Haff claimed in her answer, that the master's sale divested the lien of the complainant's mortgage, and that he had no rights in the premises.

The cause was heard on pleadings and proofs.

R. Ten Broeck and Clinton De Witt, for the complainant.

C. Stuart and J. A. Sidell, for Mrs. Haff.

Dan Marvin, for H. Walworth, Clerk, &c.

THE ASSISTANT VICE-CHANCELLOR.—It is objected preliminarily to the complainant's bill, that the mortgage in question was given as collateral security, for a mortgage of \$4000 on property in New Jersey, and that it was premature to commence this suit, until he had pursued and exhausted his remedy in that state. It is expressed in the mortgage itself that it is given as collateral security. Still I do not think that the objection is well taken.

The complainant held a mortgage against Cornell upon property in New Jersey. Cornell sold a part of the property to John P. Haff, and desired the complainant to take a mortgage from Haff on that part, for the whole of his debt, and release the residue, Haff thereby paying the consideration as between him and Cornell. The complainant assented to this, provided \$1000 were paid to him in cash. Haff was unable to raise the \$1000, and in order to secure its payment, he gave the mortgage which is the subject of this suit. At the same time, he executed a mortgage on the

New Jersey property which he bought of Cornell, for the whole sum payable to the complainant, including the \$1000, and the latter released to Cornell the unsold portion of the New Jersey property. In effect, the latter mortgage was collateral for the payment of the \$1000.

Independent of that, the mortgage in suit was payable in one year, while that in New Jersey was payable in four years. And it is alleged in the bill that the New Jersey property was not worth over \$2500. There is proof that it was worth but \$3000 in 1842, and on the foreclosure of the same which was pending when this bill was filed, it sold for only \$1100. The entire inadequacy of that property to pay any part of the \$1000 was fully established.

Under these circumstances this is not a case in which a party having a lien on two funds, will be compelled to exhaust his remedy on one of them in order to relieve a creditor who has a lien upon the other.

Assuming that the \$1000 mortgage was purely collateral, the complainant sets out by showing that the principal pledge will not suffice to pay any part of it. In such a case there is no rule of equity which precludes him from pursuing his collateral remedy as soon as it is due.

Another point made by Mrs. Haff is that the complainant's mortgage never was a lien, because it was given during the pendency of the partition suit and was not recorded till after the decree of sale.

The recording of the mortgage was not necessary to make it a lien. As to the *lis pendens*, it might result in making the mortgage fruitless, but it did not prevent its becoming a lien for the time being. This will be more fully discussed hereafter.

Next as to the objection that the mortgage was intended to give a claim upon the proceeds of Haff's share in the premises, and not upon the land itself; it is sufficient to say that the mortgage declares otherwise, and the only testimony relied upon to prove it is by parol, and thus incompetent. Moreover the fact that when the mortgage was given, it was uncertain whether there would be a sale or an actual partition, shows that a lien upon the land itself was intended by the parties. This view of

the subject disposes also of the point that the mortgage was taken as a personal security only.

To proceed to the merits of the case ; which are to be considered first, in reference to the complainant's rights as between him and John P. Haff, and second, as between him and Mrs. Haff.

FIRST. The effect of the mortgage as between the complainant and John P. Haff. There is no doubt but that it became a lien upon his undivided interest in the premises which were the subject of the partition suit. But it is contended that by the decree and sale this lien was wholly divested.

I agree with the defendant's counsel, that the complainant took his mortgage subject to all the consequences of the proceedings in the partition suit. But what were those consequences? Simply, that John P. Haff instead of owning an undivided interest in the premises, became the owner of two lots in severalty, subject to certain payments to his co-tenants in common, which are now represented by the mortgages to Speck and the clerk of the court. If the decree had been for an actual partition, it is not to be denied that the mortgage would have been a valid lien upon the share which was allotted to John P. Haff in severalty. But it is said the decree was for a sale, a sale has taken place, and Haff is now a purchaser under the decree, not an owner of a common interest. This is all true, but this court looking at the substance of things, cannot but see that as to Haff the change is one of mere form, not affecting his real interest in the premises. If the sale had wrought a change in the title by which Haff came in as purchaser, we should be informed of the payment and distribution of the purchase money to those having interests and liens. Yet it is conceded that the complainant who had such a lien has received nothing. It is answered by the defendants, that this is his fault, he should have claimed the proceeds from the master who made the sale.

To this, it might be replied that the master would not have been bound to take any notice of his claim, as it was not provided for by the decree. At all events, John P. Haff, who as the purchaser with notice of the complainant's lien, was bound to see it paid off and discharged out of the fund, or at least that its due proportion of the proceeds of the sale were paid to him ; instead

of discharging that duty, virtually retained in his own pocket the money which he should have paid to the complainant.

As a purchaser with full notice of the complainant's lien, and bound personally as well as by such notice to see that it received its share of the purchase money, John P. Haff took his conveyance from the master subject to the effect of that lien. And as a tenant in common, using the forms of a decree and sale in partition, to turn his undivided share into an interest in severalty, the lien upon his common interest would in equity attach to his allotment in severalty. The defendant's positions on this subject are good law, but are not applicable to the circumstances of the case. If a stranger had bought one or all of the lots at the sale, without notice of the mortgage, and paid his purchase money to the master, the lien of the mortgage would unquestionably have been cut off. But as to John P. Haff, I feel equally clear in holding, that it continued a lien upon the lots which he obtained in severalty, not exceeding the extent of his interest in the proceeds of the whole lands held in common, and sold under the decree.

SECOND. The effect of the complainant's mortgage after the master's sale, as between Mrs. Haff and himself.

Mrs. Haff is not a *bona fide* mortgagee for a valuable consideration. Her mortgage was given for a precedent debt due to her from her son. The debt was in fact due from her to Cooper and she would have been compelled to pay it whether she ever obtained security from her son or not. It was her debt, although he was liable to refund it to her. When she took the mortgage therefore, she parted with no money, security or value. If the mortgage proved to be good, she would save her debt; if it were bad, she stood in the same situation that she did before.

In this respect the complainant has the superior equity, for on obtaining his mortgage he parted with his lien on the New Jersey property which Cornell retained, and he never can regain his standing as an incumbrancer there. It is urged that the complainant ought to have obtained the sum which was payable to John P. Haff under the decree. With more propriety it might be said that Mrs. Haff ought to have obtained the same money, because as a party in the partition she had notice that there was such a

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sum payable to him and the time when it was payable ; whereas the complainant knew nothing of the distribution.

It is true that by force of the partition, the master's deed, and the mortgage to Mrs. Haff, she acquired the legal title ; but the consideration being a precedent debt and not any value paid, she acquired the title subject to the same equities with which it was charged while owned by John P. Haff. She therefore cannot set up the legal title against the prior and superior equity of the complainant.

A still stronger case is made against Mrs. Haff on the ground of notice. It is alleged that she had actual, as well as constructive notice of the complainant's lien when she took her mortgage.

As to actual notice, it is proved that on the occasion of completing the master's sale on the partition and distributing the proceeds, most of the parties in that suit met at the office of Mr. Elting, who was the solicitor of several of the defendants in the suit. Mrs. Haff and John P. Haff were there. The complainant's mortgage and its amount were mentioned and discussed in the presence of Mrs. Haff. She did not participate in the discussion so far as it appears ; but considering that John is her son, that she was at that time obtaining security from him on this property, and that the complainant's mortgage on it was canvassed in her presence and hearing ; it is difficult to resist the conclusion that she then learned, if she did not before know, of the existence of that mortgage.

Then as to the constructive notice. When the mortgage to the complainant was prepared, Mr. Elting was the solicitor and counsel of John P. and Mrs. Haff in the partition suit, and in fact was her general solicitor and counsel. All the papers which were executed by and between the complainant, Cornell and John P. Haff, were prepared by Mr. Elting or in his office, and he advised with the parties on the subject. He is the subscribing witness to the bond and mortgage in question.

When the mortgage to Mrs. Haff was executed, it was also prepared by or under his direction, and he acted as her counsel in the settlement of her accounts as administrator of her husband, and obtaining that mortgage from John P. Haff. Nothing

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can be more full and direct than the notice which Mr. Elting had of the complainant's bond and mortgage. And as the counsel and solicitor for Mrs. Haff this was notice to her. (See *Griffith v. Griffith*, 9 Paige's R. 315; and 1 Hoff. Ch. R. 153; *Champlin v. Laytin*, 6 Paige's R. 189, 203; *Tunstall v. Trapps*, 3 Simons, 305; also a very strong case, decided first by the Master of the Rolls, and then by Lord Brougham; *Kennedy v. Green*, 3 M. & K. 699.)

On both grounds, that Mrs. Haff was not a *bona fide* mortgagee for a present consideration paid or given, and that she had notice of the complainant's mortgage, I must hold that her lien is subject to the latter.

The complainant is entitled to a decree for the sale of the premises. And his mortgage and the costs of suit, are to be paid, next after Speck's and Walworth's respectively.

As the mortgage to Walworth was due, and his rights correctly stated in the bill, there was no necessity for his putting in an answer; and the objection being taken, he must bear his own costs of the answer.

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The complainant was vested with the title to certain real estate, in trust for the benefit of himself and various other persons owning unequal and distinct, but undivided shares therein. He was to employ an agent or substitute to manage and sell the property, and he was not required to act himself further than to execute conveyances, and was to be liable only for gross misconduct or neglect.

On a bill filed to settle the accounts of the trustee, sell the property, reimburse his advances, and wind up the trust, all the other shareholders were made defendants, together with two persons who had successively been agents or substitutes of the trustee, and whose accounts had never been adjusted. These persons were also original shareholders, and the bill sought to have their accounts settled and closed.

A demurrer to the bill for multifariousness was overruled.

June 28; August 24, 1844.

THIS case came before the court on the demurrer of the defendant, Oliver Lee, to the bill of complaint for want of equity

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and for multifariousness. The latter ground only is deemed of sufficient interest to be reported; and the residue of the case and the principal part of the opinion delivered, are therefore omitted. The complainant in 1835, was vested with the title in fee to certain lands in the village of Irving on the Cattaraugus Creek, and on the 17th day of August, 1836, executed certain articles of association, by which he acknowledged that he held the same in trust for himself and thirteen other individuals who also executed the articles. The lands were thereby made into a stock of two hundred shares, which were declared to be owned by the respective subscribers in various and unequal amounts. The lands were incumbered, and the subscribers were to pay the liens, if it became necessary. The principal object of the scheme however, was to improve the property and then to sell it in town lots, and in this mode to discharge the liens and reimburse the owners. By the articles it was declared that the trustee was to take the general care and management of the property and adopt such measures as he might deem best for the interest of the parties, with power to sell and convey the lands at his discretion as to times, terms and conditions; and he was authorized to appoint an attorney or substitute to do any of the acts which he could perform, except to execute conveyances. And it was also declared that he should be liable only for gross misconduct or neglect, it being understood that his distant residence would render it impossible for him to bestow his personal attention to the disposition and management of the property.

The complainant under this provision employed as agents or substitutes, first Lewis Eaton and then A. C. Stevens, both of whom were original shareholders. Some sales were made and the respective agents received payments and made disbursements, and the trustee advanced large sums beyond his proper share of the sums expended and paid on the incumbrances. Some of the stockholders paid, others neglected to pay.

The bill set forth these and various other matters, and sought to wind up the trust. It prayed to have the accounts of the trust (including those of the agents,) settled and closed, the rights and interests of the respective parties ascertained, the lands sold, the proceeds applied to discharge the liens and ad-

vances, and the residue if any, distributed to the stockholders entitled. And if the proceeds were deficient, then that the parties should contribute, as justice and equity might require.

The defendant Lee was made a party as the purchaser of some of the shares, and all persons interested in the 200 shares, together with Eaton and Stevens, were made defendants.

S. E. Sill, and the *Attorney General*, (George P. Barker, Esq.,) for the defendant Lee, in support of the demurrer.

Geo. William Wright, for the complainant.

THE ASSISTANT VICE-CHANCELLOR.—The charges in the bill relative to the defendants Eaton and Stevens, are said to be matters in which Lee and the other defendants have no interest or concern whatever.

Although Eaton and Stevens are called the complainant's agents, and required to account to him, it is only in the sense that they were agents of the *trustee* and of the estate, and bound to account to the trustee as such, for the benefit of all parties; not to the complainant as an individual, who is responsible to the others for their acts.

The articles state that it is impossible for the complainant to bestow his personal attention to the disposition or management of the property, and they therefore authorize him to employ an attorney or substitute, to do any act which he can do, except to execute conveyances; and they further provide that the trustee shall be liable only for gross misconduct or neglect.

There is no pretence of either of the latter having occurred. Messrs. Eaton and Stevens were successively attorneys or substitutes in the management of the property, and they received moneys belonging to the trust estate.

Now for whom did they act, and to whom must they account?

Unquestionably they acted for the whole of the stockholders, and they must account to the whole, or which is the same thing, to the trustee for them. The settlement of their accounts is a matter of as much interest to Lee as it is to the complainant, in proportion to the number of shares which have been assigned to

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Lee. And this settlement is an indispensable part of the process in ascertaining the state of the trust, the application of the proceeds, the distribution of the surplus, or if there be none, the apportionment of the deficiency.

Again, both Eaton and Stevens are stockholders and necessary parties as such. If it should turn out that they are debtors to the trust in respect of their agencies, the court will be enabled in this suit to lay hold of their shares of the proceeds of the sales and retain them for the payment of such indebtedness. The defendant Lee would have had good cause to complain if the complainant had omitted to bring these agents of the estate to an account, in connection with the settlement of the trust; especially if thereby any loss to the fund were likely to ensue.

The demurrer must be overruled.

THE NORTH AMERICAN FIRE INSURANCE COMPANY v.
MOWATT.

A long and intricate litigation had been pending in two different suits in this court, for several years, in one of which N. sought to enforce a large mortgage upon lands which M. claimed by a prior right, and G. and S., two other mortgagees, also asserted rights, in part adverse to both. N.'s suit had abated, and in the other suit M. had a favorable report from a master of the court. Thereupon M. and N. agreed that N. should buy in the claims of G. and S. at a discount; and M. was to receive a fund in court in the other suit. N. was to proceed and foreclose his large mortgage as well as those thus purchased, and sell all the lands mortgaged. Out of the proceeds of sale and prior rents, N. was to retain his advances to G. and S. with interest, and all but \$2000 of the sum taken out of court by M. with five per cent. interest. The residue was to be equally divided between M. and N.

N. immediately bought the mortgages of G. and S., but neglected to proceed to foreclose and sell, for four years, by which a loss ensued to the extent of the whole intermediate interest on the value of the property. In his answer to the suit for that object, (which was a revivor of the old suits with supplemental matter,) M. set up and proved such neglect.

Held, First. That the agreement, in substance though not in form, was a *stipulation* in those suits, disposing of the rights of the parties who executed it.

Second. That M. could insist upon his rights under the agreement, in adjusting the distribution of the fund in the revived and supplemental suit.

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Third. That N. was bound to foreclose the securities and effect the sale with reasonable diligence.

Fourth. That having omitted such diligence, he was not entitled to charge interest on the sums stipulated for him out of the proceeds, beyond the period when by reasonable diligence, such proceeds might have been realized. And the subsequent taxes were also disallowed.

Fifth. That a request by M., made after that period, not to sell during his temporary absence from the country, was not an acquiescence in the previous delay.

Sixth. That M. could not be allowed upon his answer, for interest on his half of the surplus proceeds after the date when the sale ought to have been completed. June 15, 17; August 26, 1844.

IN 1826, the complainants, then known as The Phoenix Fire Insurance Company, filed their bill in this court, to foreclose a large mortgage executed to them by Charles Mowatt on an undivided third of the real estate of his father John Mowatt, Junior, which he claimed by devise. This suit abated by the death of one of the defendants, and in February, 1832, the company filed a bill of revivor and supplement. Amongst the new parties then introduced, was James Mowatt. In the meantime a formidable suit had sprung up in which certain creditors of John Mowatt, Junior, were complainants, and his three sons and devisees, the Phoenix Insurance Company, F. Graham and wife, Ferris Pell, and others, were defendants; in which suit James Mowatt claimed that the whole remaining estate of his father, (after paying the debts of the estate,) including the lands mortgaged by C. Mowatt, belonged to him as devisee. The Phoenix Company claimed in that suit that their mortgage against Charles Mowatt was a valid lien. Graham and wife claimed in like manner a mortgage of \$12,600, and F. Pell a mortgage of \$5400, each of which were given to John E. Mowatt (the other son of J. Mowatt, Junior,) on his sale as executor of certain lands of the estate. James Mowatt's claims were adverse to all of these.

James Mowatt put in an answer to the bill of revivor of the Phoenix Company, asserting his prior right to the lands mortgaged, on the same grounds which he set up in the creditor's suit.

In November, 1832, and July, 1833, the latter suit was referred to a master to inquire into the administration of J. Mow-

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att Junior's estate, and to report upon the claims set up to the fund by and under the respective devisees. During this reference, the bill of revivor appears to have slept.

In May, 1836, the master reported in the creditor's suit. He found that there was due to James Mowatt from his brothers as executors and in respect of the estate of his father, at the date of C. Mowatt's mortgage to the Phoenix Insurance Company, more than \$66,000, which was nearly or quite equal to the whole estate of J. Mowatt, Junior, which then remained. He nevertheless reported that their mortgage had a priority as to \$6000 of the fund then in question. Exceptions were taken to this report by the Phoenix Company, by James Mowatt and by other parties. In June, 1838, these exceptions were pending, and the suit upon the bill of revivor of the Phoenix Company had again abated. The claim of F. Pell was then held by G. Suckley.

At this period, the complainants, (then known by their present corporate name,) and James Mowatt, in order to bring these perplexing controversies to a close, entered into the agreement in question, which was under seal and bears date June 28th, 1838.

The substance of the agreement was as follows: The exceptions to the master's report in the creditors suit, taken by all the parties, were to be withdrawn, the report confirmed, and the fund in court in that suit paid out according to the report. The complainants were to buy in and take an assignment of the claims of Graham and wife and Suckley, at not more than \$10,000 for the former, and \$5000 for the latter, and were to pay to James Mowatt the sum of \$13,579 42, which was the amount in court in the creditors suit. The complainants were also to file a bill, or take such other proceedings in this court as they might deem best for the purpose, for the foreclosure of their C. Mowatt mortgage, and to procure satisfaction of that and the Graham and Suckley mortgages, from the whole property mortgaged. Out of the intermediate rents, and the proceeds of the sale of the mortgaged property and of the claims obtained from Graham and Suckley, the complainants were declared entitled to retain the sums paid to Graham and Suckley, with seven per cent. interest, and the sum to be paid to J. Mowatt (less two thousand dollars,) with five per cent. interest. The residue, de-

ducting taxes and insurance, was to be equally divided between J. Mowatt and the complainants. Out of his half, Mowatt was to pay \$500 towards the legal expenses incurred before and after the agreement. The complainants were, as expressed in the instrument, "to pay their own solicitors and counsel so that the property shall not be charged with any expenses heretofore incurred or hereafter to be incurred, &c., by reason of said mortgages or claims, or of this agreement."

There was a provision for arbitration in case of disagreement, and sundry other clauses which need not be stated.

The complainants immediately purchased the Graham and Suckley claims, and paid to J. Mowatt, the \$13,579 42, pursuant to the agreement. They however omitted to proceed upon the mortgages until December 4, 1841, when they filed a bill of revivor and supplement, reviving the former suits on their C. Mowatt mortgage, and claiming to foreclose the Graham and Suckley mortgages.

In his answer to this bill, J. Mowatt set forth the agreement, the negligence of the complainants in proceeding, and the loss of interest thereby; and claimed that they should not receive out of the fund, the interest accrued on their claims, and the taxes &c. paid, after the time when by due diligence they might have brought the lands to a sale.

In February, 1844, a decree of foreclosure and sale was made in the original and revived suits, reserving all questions between the complainants and J. Mowatt. The lands were sold under this decree in March, 1844, and the gross proceeds were about \$33,000. Their value was the same in 1840, that it was in 1844, and as seven-eighths of them were vacant city lots, the income derived from them in the mean time, was very inconsiderable, and did not exceed the taxes and charges more than \$700.

The complainants claimed to deduct from the net proceeds, before dividing under the agreement, the interest at the stipulated rates to the date of the sale, on their advances for Graham and Suckley's mortgages, and the sum received out of court by J. Mowatt. On the other hand, J. Mowatt insisted that interest on those sums should cease at the end of a year or eighteen months

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from the date of the agreement. On this question the cause came to a hearing.

Dan Marvin and W. Curtis Noyes, for the complainants.

Dudley Selden, for the defendant Mowatt.

THE ASSISTANT VICE-CHANCELLOR.—The complainants object preliminarily, to the consideration of Mowatt's claim in this suit, because his remedy is upon the agreement, by a suit at law, or by a cross bill, if he be deemed entitled to relief here.

I think that the objection, in either view of it, is unfounded.

By the agreement, the parties compromised their respective claims, and combined all the outstanding liens. These were to be carried forward to a sale, and the proceeds distributed in specified proportions. The old foreclosure suits, though abated, were not dismissed, and were actually revived and used to effect the final sale. The agreement was in substance, though not in form, a stipulation in those foreclosure suits and the creditors suit, uniting the rights of these parties and providing for the ultimate disposal of the fund. The question is now for the first time presented between them, and I am not sure but that this agreement, if it had been produced at the hearing, without being set forth in the answer, would have entitled Mowatt to a reference upon the distribution of the fund.

Be that as it may, I entertain no doubt but that the court is bound to consider it in this stage of the suit. We are now upon the disposition of the fund created by this stipulation, and the question is, whether the complainants shall be permitted to take out of it the interest on their claims, and the charges on the property beyond a certain period. They obtain the principal of those claims, and the interest conceded to them, by force of this stipulation. And by force of the same instrument, Mowatt insists that this disputed interest and those charges, shall not be paid out of the fund, to diminish the share which the stipulation reserved to him. It appears to me that as between these parties, Mowatt's right to raise the question and claim the fund here, stands on the same footing that sustains the complainants right

to that part of the fund which is undisputed. As to them, the former decree settles nothing and forecloses nothing, on this subject.

This is not an attempt to set up damages, or to make a set off, as was suggested by the learned counsel for the complainants. The simple point is, to what extent shall the complainants receive interest and charges under a stipulation for the division of the fund in litigation.

I now come to the ground upon which Mowatt insists that the complainants shall not receive the interest in question. It is, that they took upon themselves to carry on the foreclosure, they were bound to do it with diligence; and if they had proceeded with diligence, the fund would have been realized more than four years sooner than it was.

1. The agreement is explicit that the complainants shall foreclose the mortgages.

2. It is a consequence, that they were to do it with reasonable diligence.

The agreement does not enable the defendant to move in the matter. Not only that, but he thereby relinquished his claims and standing in the creditors suit, where he was an actor, and could have urged forward the proceedings. His rights and interests were all merged in the stipulation. He was powerless, and wholly dependent upon the diligence of the complainants. It may be conceded, for the sake of the argument, that there was no such relation as that of principal and agent created by the stipulation; and it is clear that the foreclosure was to be prosecuted for the joint benefit. Yet it does not follow that the complainants were at liberty to proceed or not, at their option; much less that there was an adequate remedy open for Mowatt by filing his own bill.

A recent case in England before the Vice-Chancellor, Sir James Wigram, is a commanding authority on this point. (*Sowerby v. Clayton*, March 26, 1844, 8 Lond. Jurist Rep. 597.)^(a) There W. Sowerby, an administrator, with the will

^(a) Now reported in 3 Hare, 430.

annexed, filed a bill for the administration and settlement of the estate in 1823. In July, 1824, an order was made for the sale of certain reduced annuities, old and new four per cent. stocks, and bank and East India stocks, and for the investment of the proceeds in bank £3 per cent. consols. The complainant did not sell out those funds, nor prosecute the order during his life, and he died in August, 1838. The legatees under the will of his testator (who were parties defendant in his administration suit,) claimed to charge his representatives with the loss which they had sustained by his omission to sell out and invest in bank consols pursuant to the order. The Vice-Chancellor sustained the claim, and decided that W. Sowerby was bound to have prosecuted the order of July, 1824, obtained by himself; and it was no excuse for his having omitted to do so, that the defendants in the administration suit might themselves have applied to have the order carried into effect.

Next, are the complainants chargeable with the want of reasonable diligence? The stipulation was made June 28th, 1838. Their bill was filed December 4th, 1841. They seek to account for this long delay on two grounds; viz. the inherent difficulty and perplexity of the case, and the acquiescence of Mowatt.

In regard to the first, I shall be sufficiently liberal, if I take the estimate of their own counsel, Mr. Marvin. He testifies that in his opinion, if the proceedings had been commenced immediately after the execution of the stipulation, it would have taken at least *a year and a half* to have made the necessary inquiries and searches, prepared and filed the bill, served process, advertised the absent defendants, procured the appearance, &c. of the infant defendants, obtained a decree and procured a sale of the mortgaged premises.

With this allowance, the sale ought to have taken place the first of January, 1840. Proceeding from the date of Suckley's assignment, it would be the 24th of January; but as the payment of the \$13,579 42 was made on the 28th June, 1838, it must be inferred that his assignment had then been negotiated.

Then as to Mowatt's acquiescence. The whole proof of this consists in his request when leaving for Europe, after the time when the decree should have been had, that a sale might not

take place during his absence. The same testimony shows that up to the time of his departure, he had been urging that the proceedings should be brought to a completion, to a decree, so as to be ready to sell at any time when deemed advantageous. I am sure that such a request not to sell, made at that period of the affair, is no acquiescence in the precedent delay to institute the proceedings.

It was agreed by the counsel, that about seven-eighths in value of the premises sold, were vacant lots; and they also concurred in their deductions from the testimony, that the premises were worth as much in January, 1840, as the actual sales in 1844, and would have produced the same aggregate.

The result is, that if the complainants had proceeded with that diligence for which they had contracted, and which their duty to the defendant enjoined upon them; the fund arising from the sale would have been realized in January, 1840. Allowing a reasonable time to complete the sale, I will assume the first of February, 1840, as the period when it ought to have been in the hands of the master.

It would be manifestly wrong and inequitable, to allow them interest during the time that has since elapsed; and in the distribution, the interest on their claims must cease on the 1st day of February, 1840.

From the gross proceeds of the sale, the master's bill and the costs of the infant defendants are to be deducted; but the \$216 14, paid by the master for the taxes of 1842 and 1843, are not to be allowed out of the proceeds. From the net proceeds thus obtained, the complainants are entitled to retain the respective sums mentioned in the stipulation, with the interest to February 1, 1840, at the rate agreed upon.

The residue is to be divided equally between them and James Mowatt, they retaining from his half the \$500, for expenses.

To this residue, before its division, there is to be added the \$200 received by the complainants from the release of the William-street lot, and the rents received from the same lot which accrued prior to February, 1840. Also such other net income as accrued prior to that day, as exhibited by the receiver's account and other papers in the cause.

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This is all susceptible of a ready computation, and I perceive no necessity for a reference.

I cannot allow Mowatt's claim for interest since February, 1840, on the balance due to him. That is a distinct substantive claim for positive relief, which is not covered by the stipulation, and is thus beyond the scope of the suit as now constituted.

There must be a decree according to the foregoing directions.

BEACHAM'S ASSIGNEES v. ECKFORD'S EXECUTORS.

In copartnership cases, where the written agreement between the parties is doubtful in its terms, their subsequent conduct under it, is admissible in aid of the construction of the instrument and determining the question of intent.

There is no general rule fixing the date of the dissolution of a partnership as the period from which interest is to be computed against the partner who is indebted to his associate.

The allowance or refusal of interest in such cases, depends upon the circumstances of each.

E. in New York and B. in Baltimore, were partners in building a frigate in Baltimore, and subsequently in conducting a ship-yard there. E. made the advances on building the frigate and received the price; and in 1827, three years before the dissolution, was aware in general terms that in a settlement of their accounts there would be a large balance due to B. but he did not know what such balance was. There never was any settlement made between the partners. The accounts were kept at Baltimore, and there were extensive transactions afterwards, so that at the dissolution, in 1830, though E. might have well inferred that he owed B., he had no means of ascertaining what was the true balance. E. in 1827, applied to B. for an account, which B. promised to send from time to time, but it was never sent. And E. neglected to furnish his accounts to B. when requested. E. died in 1832, and there was no accurate statement of the accounts made out until 1837, after a suit was commenced by B.'s assignees against E.'s executors, for a settlement. Such statement was then made known to the executors; and it thereby appeared that there was a balance of more than \$27,000 due from E. to B. in 1830.

Held, that both parties had been remiss in their duty; that B. should have furnished his accounts so as to put E. in default; that E.'s executors should not be charged with interest from the date of the dissolution on the balance afterwards found to have been then due from E.; but that they were liable to pay interest from 1837, the date when they were authentically informed of the extent of such balance, because although the suit was then in progress, they might have paid the ascertained amount into court for the benefit of B.'s assignees.

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On the dissolution of a partnership between persons residing at different places, it is the duty of each partner to furnish to the other all their accounts, and to endeavor to adjust them and ascertain the balance; and when the same is ascertained, the one indebted must pay such balance.

This is especially the duty of the partner at the place where the principal business has been transacted.

Upon the death of a copartner, this duty becomes imperative upon the survivor, and if he neglect it, he will lose interest on the balance which may subsequently appear to have been due to him.

In a suit by the assignees of one partner against the executors of the other, for a settlement of the partnership accounts, it appeared that both parties had been in default; the accounts were intricate, the questions upon them doubtful, and though a large balance was found due, a portion of the claim equally large, was disallowed. No costs were given to either party.

May 20, 24, 25; August 28, 1844.

THE bill was filed on the 19th day of September, 1835, by Matthew Kelly and James Frazier as assignees of James Beacham of the city of Baltimore, against the executors of Henry Eckford, formerly of the city of New York, deceased, for an account of certain copartnership dealings between Eckford and Beacham. It appeared that shortly before the 28th of January, 1825, Mr. Eckford who was a very extensive ship-builder in New York, entered into a contract with M. Rebello, the Chargé of the Emperor of Brazil, to build for his government two first class frigates, for which he was to receive \$350,000 each. His contract also provided for his being paid in addition, for the fitment and armament of the vessels, in case he was required to and did fit and furnish them for sea.

Mr. Eckford having determined to build one of the frigates in Baltimore, entered into a contract with Beacham, who was a ship-builder at that port, by which it was mutually agreed that they should build the vessel on joint account, Mr. E. making the necessary advances and furnishing the live oak and some other materials. The frigate was built accordingly, and was finished in the summer of 1826. She was called the "Baltimore." On her completion, Mr. Eckford at M. Rebello's request, proceeded and fitted her out for sea, and sent her with a small armament and a complement of officers and men, to Rio Janeiro, and in 1827 he shipped the residue of her armament to Brazil directly from New York. B. aided E. in procuring such of the fitments in

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1826, as were furnished in Baltimore, and they were put on board the frigate there under his direction.

Mr. Eckford received the stipulated price for the frigate; and also the payments for the fitment and armament, on which there was a large profit. When the frigate was about to sail it became necessary to give bonds under the Neutrality Act of Congress, which was done by E. and B. with two sureties, in the sum of \$600,000, Mr. E. being good for that amount, and Beacham being of comparatively limited means. For this service \$12,000 was paid to Eckford.

The partnership in the Baltimore ship-yard continued until November 6, 1830, during which time several other vessels were built, and others repaired.

Mr. Eckford died in November, 1831. Requests for accounts were made on both sides from 1827 onward, but none were furnished so as to exhibit a full statement, and no settlement ever took place. A large balance was claimed by B. to be due to him from the estate of E., which in the bill was alleged to be at least \$25,000, and the executors were repeatedly called upon to account and pay, which calls they met by a request for the Baltimore books and accounts. No accurate statement and balance sheet of the partnership transactions was ever made up until June, 1837. The one then made was furnished to the executors, and it exhibited a balance due from Eckford to Beacham at the dissolution, which on the most favorable footing for the executors, exceeded \$27,000. They did not pay or offer any sum to the assignees of Beacham, or bring any amount into court for their benefit.

The suit had then been pending nearly two years, and in November, 1839, it was referred to David Codwise, Esq., one of the masters of the court, to take and state the partnership accounts.

On the reference, the complainants claimed that Beacham was equally interested with Eckford in the outfit account of the frigate Baltimore, and in the sum received for bonding her. Also that they were entitled to interest from the date of the dissolution, on the balance ascertained to have been at that time due from Eckford to Beacham. The master allowed all these claims, and in February, 1844, made his report, by which it appeared

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that there was due from the estate of Eckford to the complainants \$37,879 49 of principal and \$35,280 53, of interest; in all \$73,160 02. He also reported the balance which would be due on omitting the outfit account and the sum paid for bonding, on which footing there was due of principal \$27,494 77, and of interest, \$25,608 32, making a total of \$53,103 09.

The defendants excepted to the master's report in respect of all the allowances beyond the principal sum of \$27,494 77; and the cause came on to be heard on their exceptions, with the pleadings, evidence, and the proceedings and testimony before the master.

The principal part of the argument, and of the judgment of the court, related to the questions affecting Beacham's claim to participate in the outfit and bonding of the frigate. The reporter, believing that this part of the case is not of sufficient interest to warrant its insertion, has omitted the whole of it, with the exception of a single point; and the report is limited to that point and the question of interest.

Some additional facts will be found mentioned in the opinion.

F. B. Cutting and Murray Hoffman, for the defendants in support of the exceptions.

J. L. Mason and J. Prescott Hall, for the complainants.

THE ASSISTANT VICE-CHANCELLOR, (first examined the exception relating to the profits and commissions on the outfit account of the frigate, and after discussing the question upon the terms of the respective agreements between M. Rebello and Eckford, and between the latter and Beacham, and upon the testimony bearing upon the first agreement, proceeded as follows.)

I have stated that the testimony convinces me that the outfit, and all beyond what was embraced in the contract for \$350,000, were in pursuance of a new contract between Eckford and Rebello, or were furnished upon a *quantum meruit*.

Is there any evidence that Beacham was concerned with E. in this transaction?

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Such testimony as there is, touching this point, bears also upon the question of intent in the copartnership agreement, as illustrated by the subsequent conduct of the parties. This mode of arriving at the construction, where the instrument itself is doubtful, is well settled in partnership cases. (Story on Part. 287, 288, § 191, 192; Collyer on Part. 112, B. 2, ch. 2, § 2. *Geddes v. Wallace*, 2 Bligh's R. 270, 297. And see *Shore v. Wilson*, 9 Clark & Fin. 566, per Tindal, Ch. J.; S. C. in 11 Simons, 592, 615 note, and 5 Scott's New R. 958; *Attorney General v. Drummond*, 1 Dr. & Warren, 368, per Sugden, Chancellor.)

In support of Beacham's right to participate, the complainants rely upon the fact that he furnished a portion of the outfit from the joint funds at Baltimore; upon the entries in the books of Eckford; and upon the inference that the outfit was an incident to the copartnership business, and there was no motive for B. to engage in it, or justice in E.'s asking him to engage in it, unless he was to be interested in its benefits.

I have already adverted to these inferences, and will observe nothing farther on the subject, except to say that the outfit was not an incident to the building. It was a distinct branch of business, defined as such in Rebello's contract; and he was at liberty to employ any one or more to supply it, and could have it put on board in Baltimore, New York, or elsewhere.

The circumstance that so much of the outfit as was furnished in 1826, was put on board at Baltimore, does not give to it the character of an incident to the building, any more than if it had been put on board in New York. To recur to the facts relied upon.

After the frigate was launched, when by his contract Rebello was to receive her, and Eckford's duty was performed; Rebello employed Eckford to deliver the ship at Rio Janeiro, and to furnish her with the furniture and armament requisite for such a vessel when fully armed. This included of course the victualing and manning the ship for her outward voyage. She was at Baltimore, and it was a needless expense to bring her to New York, to fit her out and send her to sea. It was therefore done at the port of Baltimore. Eckford having a partner there in a ship-yard, and an agent, Hazel, in whom he had confidence, made use of

their aid in fitting out the ship. They were drawing upon him constantly for moneys. And Beacham paid for a large portion of the outfit made in 1826, out of those funds, and by delivering drafts on Eckford directly to the outfitters. I might say that Hazel was as much an actor as Beacham, but B. was the principal there and H. a clerk. Eckford himself procured in New York, and sent to Baltimore, a still larger portion of the outfit.

Now I cannot perceive that these facts establish any agreement for Beacham to share in the outfit. He acted for E., at his request; and by drawing the drafts, chiefly with his means. He may have done this as a gratuity, or he may have expected compensation; but I cannot say that he did it as a partner.

If the right to share rests upon the sole ground that B. transacted a part of it in Baltimore, it must either be limited to the part which he transacted, or else it is a good right to the extent of the whole armament contract with Rebello. If B. were interested in what E. furnished in New York in 1826, why is he not equally interested in what E. furnished on the same contract in 1827? The latter was as much an incident to building the frigate as the former, and they were partners in the ship-yard at Baltimore in 1827. It would seem that the claim for the armament, which was at first asserted on the reference and then withdrawn, was deemed rather too bald by the complainants themselves. Yet it is difficult to see why it is any weaker than the claim for the outfit furnished in 1826, which included a part of the armament.

Next, the evidence derived from Eckford's books. It appears that he opened an account against "Baltimore Frigate," in which he entered indiscriminately, his disbursements for the frame and building, as well as for the outfit, and so much of the armament as went forward in 1826. And it is argued that this was either to exhibit his profit, or by way of an account against Beacham; and in either event, shows that he deemed the building and outfit as one contract and one transaction. Under this account, the profits, as well as the cost price, are entered on many articles bought for the outfit; and it was argued that this fact proves that the account could not have been kept as one against Rebello, or

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to show Eckford the whole cost of the frigate ; and thus it must have been an account against Beacham.

It is somewhat doubtful with what view the account was kept. It was not an account against Beacham, for two reasons. There is a distinct account against him in the ledger, in which all his drafts are charged to him ; and the profits on the outfit are entered in the frigate account, which could not be a charge against B., even if the outfit itself were. I give no heed to the suggestion that E. intended this as an account against Beacham, and designed to defraud him by these entries. It is absurd to suppose that B. would pass over without discovery, a charge of five cents a pound for shot, entered expressly as *an extra charge* on a bill previously entered, when the five cents extra was double the whole cost of the article. Similar instances might be mentioned. And if I were compelled to believe that Mr. Eckford, whose ledger shows that he was then dealing in building vessels for foreign governments to the amount of millions of dollars, would stoop to so pitiful a fraud on his partner in a sub-contract ; I surely discover no evidence in the case to induce me to think that he was so weak and foolish as to place the record of it on the face of his account with that partner.

The ledger discloses a similar account in all respects with the Amazon, the other frigate built for Rebello. And my opinion upon the whole is, that the account against the Baltimore, was designed to furnish at one view, the *data* for an account against Rebello for the extra charges, and for ascertaining the profit on the whole. If as I suppose, the outfit was not furnished under the original contract with Rebello, the great per centage charged on the ball and other articles, was not incorrect. At all events, this account does not aid me in sustaining Beacham's claim to share in the outfit. In that respect it proves nothing for either party.

I now come to some evidence on the other side. Henry Hazel was the accountant who, by the agreement between E. and Beacham, was to keep the books of the concern in Baltimore, and he kept them from 1825, till 1827 or 1828. When the outfit charges came to be paid, Hazel supposing that they were not within the contract for building the frigate, or within the ship-yard business of Eckford and B., opened a separate account against the frigate

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for those charges, and they were all entered in that account from time to time as they were paid. All the charges and expenses for building the frigate he had entered under "Ship Yard" account, and such as were paid in the summer and fall of 1826, after he commenced the separate account, were entered there still. It was perfectly proper, assuming that the outfit was Eckford's alone, to enter it in some form on the books of E. and Beacham; because the payments were made in that concern, and there were no other books in which B. could enter them. Its propriety is also shown by the fact that a small account of money paid by B. for E., and without dispute for E. individually, appeared in the same books.

It is true that Eckford told Hazel to open such separate account against the frigate for outfit, and this was about the time the first disbursements were made for that purpose. This, if it proves anything, proves that E. did not suppose or intend that B. had any interest in the outfit. No separate account was necessary, if this was a co-partnership transaction, for the "Ship Yard" account would exhibit the items just as well as a new one.

The new account thus opened, was in effect therefore, an account against Eckford individually. So it would appear to Beacham, and so Hazel treated it throughout, down to the time that he prepared for the complainants, while testifying in this cause, the book given in evidence as exhibiting the accounts between Eckford and Beacham. This outfit account was thus opened and continued by Beacham's clerk, in his own ship-yard, and under his daily observation, and I cannot doubt, with his knowledge and approbation. How can I resist the conclusion which is forced upon me, that he understood its object, and did not imagine that he had any interest in the outfit?

There is further testimony that leads to the same conclusion, which is to be found in Beacham's letters, relative to a settlement. In one to Eckford, he says, "I am desirous of having the books adjusted, which I cannot do for the want of *your accounts against the yard.*" In another, he says "we have all our accounts posted and settled as far as practicable without *your accounts against the yard.*" In a letter to Mr. Clinch, he asks to

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be furnished with a list of Mr. Eckford's *payments and charges*; and in another letter to Clinch, he says there was a number of *articles furnished* for the use of the concern by Mr. E. of which he never has had an account from E.; *and if he had those accounts there would be no difficulty in bringing the whole matter to a close forthwith.*

In the two last letters, there are expressions which favor the claim that all the moneys for which he drew on E., were disbursed on joint account. But it appears to me that these are of no force, on looking at this prominent assertion so often repeated, that Beacham required nothing but an account of Eckford's disbursements to balance their books, and close the whole matter. This seems utterly irreconcilable with the position that B. was interested in the outfit. He asks for no account of Eckford's receipts from Rebello, an account, without which the matter never could be closed, if the outfit were to be brought in. There was nothing on the books at Baltimore to show what E. had received for the outfit and armament. It is not pretended that B. knew any thing about it.

Yet he asseverates over and over, that if E. or his executors will send him a statement of moneys paid, he will adjust the books at once and close the whole.

He could not do what he alleged, if the outfit were any part of the joint concern. He could do it with ease, if it were not. In the matters of conceded joint account, Eckford had received but a single sum, the \$350,000, stipulated for the frigate at the outset, and Beacham needed no statement or account of that great item, to enable him to make a settlement.

Upon the whole, I do not think that by the terms of the co-partnership agreement, Beacham was to be interested in the outfit or armament for the frigate. In looking to the practical construction of the parties under the agreement, I find that it confirms that opinion. And the evidence does not satisfy me, that the parties ever expected or intended, either in view of the written agreement, or without regard to it, that Beacham was to be interested in the outfit or armament.

Eckford was the contractor for it in his own name. The burthen of proving an interest in Beacham lies upon the complain-

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ants; and although it is with great diffidence that I differ from the accomplished and experienced master who made the report, my judgment is clear that they have not sustained their claim in regard to the outfit.

The first exception is therefore allowed.

(The court next investigated the exception relative to the payment of \$12,000 for bonding the frigate, and decided that it was well taken, and that Beacham was not entitled to participate in that sum with Eckford.

The opinion then proceeded.)

The third exception is to the allowance of interest by the master on the balance found due from Eckford. After deducting the outfit account and all *extras*, it appears that there was \$27,494 77 due from Eckford to Beacham, on the 6th of November, 1830, the date fixed upon as the termination of the copartnership. A sum which was unquestionably of great moment to Beacham, however inconsiderable it may have appeared to Mr. Eckford in his gigantic enterprises.

The master has charged his estate with interest from the time of the dissolution.

The question is one of much difficulty as well as importance, and the right disposition of it has caused me no small degree of anxiety.

The books to which I was referred, do not furnish anything decisive.

Mr. Collyer says, that in the cases where interest is decreed, the partner paying it is considered in equity as a trustee for the copartnership. (Colly. on Part. B. 2, ch. 3, § 4, art. 11.)

The principles applicable to trustees would afford a plain guide, but I apprehend that other considerations affect most of the cases. In *Crawshay v. Collins*, 15 Ves. 218, which was cited by Chancellor Kent in the case of *Stoughton and Lynch*, the continuing partners had used the bankrupt's share in their trade, and the decree was for an account and inquiry whether they had made any and what profits thereby. It was not a case of interest.

In *Stoughton v. Lynch*, 1 J. C. R. 467, and 2 *ibid.* 209, there

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was a covenant that neither partner should withdraw any capital or profits, except as might be necessary for private expenses, but they were to be employed for the benefit of the concern. The defendant having withdrawn a large sum, which he claimed for expenses, (of which \$10,000 and upwards was rejected by the court as not *necessary* expenses;) he was charged with interest on such excess. In stating the account, the master after charging such interest, made a rest at the date of the dissolution.

Chancellor Kent, in 1 J. C. R. 467, declared that the defendant should pay interest on all the moneys withdrawn by him beyond his necessary private expenses. When the case came before him again, in 2 J. C. R., there was an exception taken by the defendant to the rest made by the master, and upon that exception the Chancellor observes: "The time of the dissolution of the partnership, was, undoubtedly, the proper period to adjust the balance, and the party who was then the debtor, became so with obligation to pay, and is therefore, justly chargeable with interest on such debt. It would seem to me very unreasonable, that the balance then truly due, should be retained in his hands down to this day, free of all interest. I apprehend that this is the general practice, as well as the good sense of the thing, that a rest should be made on the liquidation and adjustment of accounts, at the period of the first dissolution of the concern."

An *opinion* merely of the learned Chancellor, I should regard with profound respect. The weight of an authority is claimed for the proposition which I have quoted, and this is denied on the other side. The report of the case is somewhat obscure in reference to this point. If the withdrawals of the defendant from the assets of the firm on which he had been subjected to interest, when the suit was first before the Chancellor, were equal to or exceeded the balance due from him at the date of the dissolution in 1795; it would have been perfectly right to make a rest then, because those withdrawals commenced in 1783, and were very large in the two following years. The report shows that when the account was taken under the Chancellor's first decision in 1 J. C. R., there was a strenuous effort to charge the defendant with compound interest, on the moneys he had withdrawn. The

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master refused thus to state the account, and instead of it, he made one rest between 1784 and 1816. This was at the date of the dissolution, but whether because that was the ordinary practice, or because it was just in that particular case, the report does not disclose. I infer the latter, from the fact that compound interest was claimed. And in that event, the opinion of Chancellor Kent affirming his decision, would not carry with it the great weight of his authority in favor of the principle claimed, as being the sole ground of his decree. The master in that case reported due on the 13th May, 1816, \$22,216. This sum included nearly twenty-one years interest after the period of the rest made in the account, and on that assumption, the balance in 1795, was considerably less than the defendant's withdrawals from the firm which the Chancellor rejected; to say nothing of such as are not stated in the report of the case. This strongly corroborates the conclusion that the master acted upon the peculiar circumstances. I am therefore induced to believe, that *Stoughton v. Lynch*, is not a full decision that the period of dissolution, as a general rule, is to be the time from which interest is to be computed upon the balance subsequently found to be due from one partner to the other.

In *Consequa v. Fanning*, 3 J. C. R. 587, 601, which was the case of a factor, Chancellor Kent said, "Unsettled accounts do not bear interest as of course, until liquidation."

The same thing was decided in our highest court, in the *Rensselaer Glass Factory v. Reid*, 5 Cowen's R. 587, as to unliquidated accounts generally, excepting items of cash advanced.

In *Waggoner v. Gray's Administrators*, 2 Hen. & Mun. 603, the Court of Appeals in Virginia, in a partnership case, decided that interest ought not to be allowed on an unliquidated account.

In *Dexter v. Arnold*, 3 Mason's R. 284, Mr. Justice Story, said "interest is not allowed upon partnership accounts generally, until after a balance is struck on a settlement between the partners; unless the parties have otherwise agreed or acted in their partnership concerns." In that case the bill was for an account by the representatives of a deceased partner, against the survivor, who was also the administrator of the deceased. They

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surcharged and falsified the account stated by the survivor, and they claimed to charge him with interest on the amount of the errors ascertained. The court said there was no evidence of intentional error, and that no general interest account was ever contemplated between the partners; and they held that there was no ground for the allowance of interest before the errors were ascertained. In his Commentaries on the Law of Partnership, the learned judge does not treat upon this subject. (Story on Part. 499, § 349, note 2.)

On the other hand, in *Simpson v. Felts*, 1 McCord's Ch. R. 213, where the court below had refused interest, saying that there had been several ineffectual attempts to compromise, and it did not then appear in what amount, if any, the defendant was indebted to the complainant; the Court of Appeals of South Carolina, reversed the decree. Judge Nott in delivering their opinion, said that the rule in their state is, where one man has retained the money of another, to presume he kept it for the purpose of profit, and therefore he must pay interest on it. The balance due by the defendant is so much of the funds of the firm retained by him to which he was not entitled, and for the use of which he ought therefore to pay interest.

In *Bowling's Heirs v. Dobyn's Administrators*, 5 Dana's R. 434, Bowling and Dobyn had been partners as drovers, and B. had received the whole effects. By his own admission before the suit, he owed over \$1600, which he failed to pay. The decree declared that there was \$1682 due from him, and it allowed interest from the time of filing the bill. This allowance was excepted to, but it was sustained on appeal.

In *Honore v. Colmesnil*, 7 *ibid.* 199, there was an intricate and protracted copartnership controversy. H. had furnished almost all the capital. C. was the bookkeeper of the concern, and at the dissolution owed a large balance to H. In the accounting, H. claimed interest on the excess of his capital from the time it was put in. This was disallowed; but the court charged C. with interest from the date of the dissolution, on the balance then due from him, although it was only ascertained by the result of the suit. The court say, that if in any case, interest is not to be allowed, because at the dissolution the accounts are unliquidated, it

will not be so where the debtor partner was the book-keeper, and was bound to know the state of the accounts and the extent of his own indebtedness.

This statement of the authorities shows that there is no general rule which is applicable to this case, and on which I can rest, to fix the date of the dissolution as the period from whence interest is to be computed.

The case of *Stoughton v. Lynch*, I am satisfied should not be regarded as a *decision*, establishing a general rule; and the opinion of the revered Chancellor on this point, is met by the contrary opinion of another eminent jurist in *Dexter v. Arnold*, as well as the general principle in regard to interest on unliquidated accounts as settled in the *Rensselaer Glass Factory v. Reid*.

The South Carolina decision, is in effect opposed to that in Virginia, and to *Bowling v. Doby*, in Kentucky, and the principle there asserted by Judge Nott, as the ground for imposing interest, is not the law here.

And *Honore v. Colmesnil*, which was so much relied upon by the complainant's counsel, was decided upon its peculiar facts. The most prominent feature in that case, and the one which was decisive as to the allowance of interest, was the fact that the defaulting party was the one who kept the books, and was thus chargeable with actual knowledge of the precise state of their affairs; a fact which does not exist in this case.

I am convinced that the allowance or refusal of interest in partnership accounts must, in a great measure, depend upon the application of various legal principles to the circumstances of each case.

In the event of such a conclusion, the complainants claim that the master's decision should be sustained on the circumstances proved in evidence, independent of the force of the adjudged cases.

1. It is said that the copartnership agreement calls for this charge of interest.

I understand it otherwise. It is a part of the paragraph in which Eckford agrees to advance the money for carrying on the business of the ship-yard, and which provides that the moneys

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received are to be placed to his credit. It concludes with these words, "and an interest account to be kept between *him* and the concern." This clause clearly refers to Eckford's cash advances, which were likely to be heavy in the first instance, and to the cash payments from which he was to be re-imbursed. It is not applicable to the general concerns of the partnership. The master did not allow the interest in pursuance of the contract, as is obvious from his report.

2. It is claimed on the ground that Eckford was aware in 1827, of the large balance due to Beacham, and he ought to have paid it then, or at least at the dissolution.

I think it is indisputable that Eckford knew when he received Hazel's letter, of July 21, 1827, that Beacham in their settlement would be entitled to a large sum for his proportion of the profits on building the frigate. His own ledger, with Hazel's letter, would have showed him that general result. I do not understand whether the balance then stated by Hazel, from the Baltimore books, was vitiated by the extensive errors which subsequently appeared on dissecting the book made by the accountant Smith. Assuming that it was not erroneous, it did not, however, apprise Eckford of the precise balance as it then stood between him and B.

There was no direct obligation upon E. to pay over to B. at that time, even if the balance were known.

Then how was it when the obligation to account and pay became operative on both Beacham and Eckford, by the dissolution?

The information which Eckford had in 1827, would be no criterion for the state of affairs in 1830; the ship-yard having been in active operation during the whole interval, without E.'s receiving anything from it.

Eckford might reasonably infer, what the accounting has proved, that he had received considerable more than his share of the profits of the whole concern; but it was not in his power to know or ascertain, without having Beacham's accounts. It was the duty of each partner at that time to furnish to the other all their accounts, and to endeavor to adjust them, and it was the

duty of the debtor to pay the balance thus ascertained. It was especially the duty of Beacham to render an account, because the great mass of the transactions of the firm were entered in his books, while only a small portion of them appeared in the books of Eckford.

I have not a doubt but that if Beacham had discharged his duty in this respect, Eckford would have been chargeable with interest from the date of the dissolution, and I would most cheerfully have enforced that liability.

But what was the course of Beacham? It appears by the letter of Hazel before mentioned, that as early as July, 1827, Eckford had applied to Beacham, or to Hazel as the accountant in his immediate charge, for the account of B.'s expenditures on the frigate; the great business of their firm up to that time; and that it could not be furnished, because of the manner in which the stock in the ship-yard had been used. All that he obtained were the gross footings of Beacham's own account.

Beacham's letter of October 10, 1828, shows that there had as yet been no statement furnished to Eckford, and in another letter of October 29, 1828, he says he will send copies of all the accounts from the books. He never did transmit the statements or copies. He was advised not to do so, till he obtained Eckford's account, and he was incessant in his requests to E. to furnish such accounts.

He had done nothing prior to the dissolution, which would enable Eckford to strike the balance.

After that event, there was no change until Eckford's death. Then a more imperative duty devolved upon Beacham, as the surviving partner, to adjust the accounts and ascertain the balance. Still he placed nothing in the hands of E.'s representatives, but persisted in calling for E.'s accounts, and in drawing the settlement to Baltimore.

In 1834 or 1835, the assignees of Beacham procured the witness Smith, to make up the accounts from B.'s books, and he prepared the *Book C. 2*; which in the progress of this suit was shown to be erroneous in favor of Beacham to the amount of nearly \$11,000.

On this book, the suit was instituted, and it was not till June

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29, 1837, when Hazel had re-examined Beacham's accounts, and made up the *Book B. V.*, that the true state of those accounts was for the first time brought to the knowledge of Eckford's executors.

It is an undeniable fact that Eckford himself was in his lifetime, equally remiss on his part. To Beacham's repeated applications for his accounts, he was negligent, or indisposed to accede. And no account was furnished to Beacham, prior to the answer of his executors in this cause. If perchance the balance had resulted in their favor, this negligence would have operated against them on the question of interest.

But after an anxious consideration of the subject, I cannot visit upon the estate of Eckford, in favor of Beacham, as an offence, a neglect of which the latter is as guilty as the former. I look upon the long delay in settling the accounts as the fault of both parties, and so far as I can judge, the one is as culpable as the other.

By reason of this mutual omission and neglect, no balance was ascertained or known; and there was no default in paying, because there was no fixed sum to pay. There was in truth a large balance which ought to have been paid to B. in 1830, but which could not be adjusted without his account, nor even definitely known. He should have furnished that account, in order to put Eckford in default; but having omitted that duty, he cannot equitably complain that E. did not perform his corresponding duty, and pay the sum really due.

On Hazel's production of the *Book B. V.*, in June, 1837, the defendants first had the information which put them in default in reference to the balance due to Beacham. With the aid of their own books, the state of the accounts was then opened to them; and from that time they are justly chargeable with interest. It is true, this suit was then in active progress; but the amount or probable amount could have been paid into court, and made productive to the complainants, or at once paid out to them.

It is quite rigid to insist that a party shall pay interest the moment that he is possessed of the means of knowing how much principal he ought to pay; but under the peculiar circumstances

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of this case, I feel impelled to hold the defendants to that strictness.

The third exception is allowed to the extent of the interest prior to June 29, 1837.

As to the costs of the suit, they must be borne by the respective parties. Both have been in default. Besides that, the account has been intricate and doubtful, and there has been a successful defence to a large portion of the demand.

**HORNBECK'S EXECUTOR v. THE AMERICAN BIBLE SOCIETY
and others.**

Bequests for charitable purposes to unincorporated societies, are sustained, where the object is competent, and is designated or may be clearly ascertained.

Where in bequests for such purposes, the name of the legatee is defectively described, extrinsic evidence is admissible to show what society or corporation was intended by the testator.

An abbreviation of the name of the society intended, does not vitiate the legacy; and resort may be had to a prefix applied to another society, and occurring in the same sentence, to complete the designation.

Various facts admitted in aid of construing a will and ascertaining the objects intended by the testatrix in her bequests for charitable purposes, viz. that the testatrix was a member of a society claiming the fund; she was attached to a specified sect or denomination; she had in her life made donations to such society; she was a correspondent of its officers, and had taken a warm interest in its particular objects; her deceased husband had exhibited such interest, and had made similar gifts personally and by his will; as his executrix, she had transmitted the latter; and that there is no other like society or institution.

Where a bequest is given to a seminary or charitable institution by name, which is only a descriptive name of a particular institution or charity established and conducted by an incorporated college or society; it is a valid legacy to such corporation to be applied in respect of the institution designated.

So held upon a bequest to a theological seminary, which was an institution established and conducted by the synod of the Dutch Church; and also on bequests to the boards of missions, which were established and conducted by the same Synod.

On the construction of a will, legacies to the "Treasurers of the following societies, Am. Bible, Tract, Synods Board of Missions, Domestic Missions, N. Y. Colonization and Seaman's Friend;" were held intended for The American Bible Society, The American Tract Society, The General Synod of the Reformed Protestant Dutch Church, The New York State Colonization Society, and The American Seaman's Friend Society.

June 11; August 29, 1844.

Hornbeck's Executor v. American Bible Society.

THIS was a bill exhibited by William Y. Miller, the executor of Mrs. Elizabeth P. Hornbeck of Wallkill in the county of Orange, deceased, to obtain a construction of her last will and testament, and the direction of the court as to the disposal of her estate.

The will was dated July 18, 1842, and she died on the eleventh day of March ensuing. It directed her executor to sell all her real estate, and then bestowed out of the fund, various legacies, amongst which was one to the Theological Seminary at New Brunswick, under the charge of the Protestant Reformed Dutch Church; and she gave the residue of her estate to the treasurers of certain societies described in the will as "Am. Bible, Tract, Synods Board of Missions, Domestic Missions, N. Y. Colonization and Seaman's Friend." These bequests are quoted at large, and several facts respecting them are mentioned, in the judgment of the court.

The bill stated that these legacies were claimed by the American Bible Society, the American Tract Society, the General Synod of the Reformed Protestant Dutch Church, the New York Colonization Society and the American Seaman's Friend Society, respectively. That the first and last named, and the Synod, are corporations, and the others are unincorporated. That besides those, there are the Protestant Episcopal Tract Society, and also their Board of Missions, and the New York City Tract Society; all situated in the city of New York, where the others have their several places of business. That W. Phillips, the next of kin of the testatrix, insisted that all these bequests were void for uncertainty and other causes, and that the unincorporated societies were incapable of receiving such legacies.

The executor declared his readiness to pay the fund in his hands, about \$25,000, to the parties entitled thereto, and asked the direction of the court in that behalf.

The two societies of the Protestant Episcopal Church answered, disclaiming the legacies to the Tract Society and for Missions. All the other societies before named, put in answers claiming the several legacies, and the General Synod of the Dutch Church claimed the bequest for the Theological Seminary at New Bruns-

wick. W. Phillips interposed his rights as next of kin, upon the grounds stated in the bill.

G. M. Ogden, for the complainant.

H. Holden and *S. A. Foot*, for the American Bible, Tract, and Seaman's Friend Societies, and for the New York State Colonization Society.

D. Lord, Jr., for the General Synod of the Reformed Protestant Dutch Church.

W. Silliman, for the Protestant Episcopal Tract Society.

C. Edwards, for the Board of Missions of the Protestant Episcopal Church.

D. B. Ogden, for the next of kin.

THE ASSISTANT VICE-CHANCELLOR.—As the case is presented by the bill, the fund is to be deemed personal property of the testatrix.

There is nothing in the point that the unincorporated societies are incapable of receiving the bequests to them. (*Potter v. Chapin*, 6 Paige's R. 639, 649; *Wright v. Methodist Church*, 1 Hoff. Ch. Rep. 202; *King v. Woodhull*, 3 Edw. Ch. R. 79.)

The principal questions arise upon the seventh clause of the will, which is in these words: "The residue and remainder of my estate after the payment of all my just debts, I give and bequeath to the treasurers of the following societies—Am. Bible, Tract, Synods Board of Missions, Domestic Missions, N. Y. Colonization, and Seaman's Friend."

1. The American Bible Society claims the bequest under the description of "*Am. Bible*" Society in the will.

The description in this instance is perfect, except that *Am.* is written instead of *American*. This is a common abbreviation for *American*, and in the absence of any institution of the kind

of a similar name, there can be no doubt but this corporation was the one intended.

2. The legacy to "Tract Society," is claimed by the American Tract Society. There are two other tract societies in the city of New York—The New York City Tract Society, and The Protestant Episcopal Tract Society. The latter institution disclaims, and the former now concedes the legacy to the American Tract Society.

The word "*Tract*," of itself furnishes no designation. But it is competent to make out by averment, who is the person intended by a defective description.

In this instance, the prefix "*Am.*" may be extended to aid the construction, and it then becomes the American Tract Society, and all doubt is at an end.

Moreover the American Tract Society is a corporation whose purposes and operations extend throughout the country. The testatrix and her late husband were members of it; her husband had left a legacy to it, which she had paid as his executrix. Under such circumstances there is not a particle of doubt but that this bequest was intended for the American Tract Society.

3. The New York State Colonization Society, an unincorporated association, claims the legacy given to the "N. Y. Colonization Society." It appears that this is the only colonization society in this state. The only omission in the will, is the word "State" in describing it, and the identity is too clear to need any argument.

4. The legacy to "Seaman's Friend Society," is claimed by The American Seaman's Friend Society, a corporate institution. In this instance the prefix "*Am.*" is too far removed in the will to aid in the construction. It is shown however, that the claimants are the only Seaman's Friend Society in this state; and that they had been the special objects of the benevolence of the testatrix and of her husband when they were alive; her husband left a legacy to the society, which she transmitted to them; she corresponded with the treasurer of the society, and her letter produced shows that she felt a warm interest in the objects of the charity which the society is engaged in promoting.

She unquestionably intended the bequest for The American Seaman's Friend Society.

5. The General Synod of the Reformed Protestant Dutch Church, claim the other two legacies in the seventh clause of the will; and also the legacy in the sixth clause, which is in these words. "*Sixth.* To the Theological Seminary at New Brunswick, under the charge of the Protestant Reformed Dutch Church, I give and bequeath the sum of four thousand dollars to be secured by good bond and mortgage, and the interest of said sum to be applied in educating pious and indigent young men for the gospel ministry."

First. The bequest to the seminary is a good bequest by way of charitable use to the Synod of the Dutch Church. The claimants are a corporation, and amongst other eleemosynary institutions established by them, is this seminary at New Brunswick. The gift is like one to endow a professorship in a college. The charity is the object present to the testator's mind; the corporate or associate name of the society which executes the charity, is not so likely to be thought of, or if thought of, to be correctly stated. Here the charitable object is described, and the income appropriated. The intention was to give it for the seminary. It being given to the seminary, which is only a mere descriptive name of a part of the corporate institution, The Synod of the Dutch Church; it would be doing great violence to the testatrix's intention to say that she did not mean to give it to that synod, for the use of the seminary. It is in effect a bequest to the Protestant Reformed Dutch Church for the seminary under their charge, and the claimants are clearly entitled to it. A similar gift was sustained for the Methodist Church in John-street, in favor of the general corporation of that church in *Wright v. Methodist Epis. Church*, 1 Hoff. Ch. R. 202, 238.

Next, the legacies to the Synods Board of Missions, and to Domestic Missions.

The Synod of the Dutch Church has established boards of managers for conducting their foreign and domestic missionary operations, which boards act as separate boards or committees, and are agents of the corporations, and they are together designated as the "Synod's Boards of Missions." The operations of

Hornbeck's Executor v. American Bible Society.

the foreign and domestic missions are distinct, and separate reports are made of each to the Synod, and in the ordinary language of the members of the Dutch Church, the boards are spoken of and known as the *Synod's Board of Foreign Missions* and the *Synod's Board of Domestic Missions*, respectively.

In regard to the bequest to the *Synod's Board of Missions*, there is no room for doubt. What I have said in reference to the legacy to the seminary is applicable to this also. Then as to the legacy to "*Domestic Missions*." The Board of Missions of the Protestant Episcopal Church, which is the only institution of a similar name, disclaims the legacy. It is not a case of competition therefore, but merely a defective description of a legatee to charitable uses; the testatrix having used the name of the object of her benevolence, instead of that of the institution which was to perform the object. The gift is in terms to the Treasurer of Domestic Missions.

She had previously manifested her feeling of special regard for the institutions of the Synod of the Dutch Church by the gift to the seminary and to the Board of Missions, and in immediate sequence with the latter, she gives this legacy to domestic missions. There being no other body of a similar name conducting domestic missions, the juxtaposition of the bequests, and this feeling of partiality for the synod which I have mentioned, lead me to the conclusion that she intended the legacy in question for the Synod's Board of Domestic Missions, while the other was designed for their foreign missions. The word *Treasurer* which goes before all the legacies in the seventh clause, avoids the objection that "*Domestic Missions*" is too vague of itself. The extrinsic circumstances concur with the contents of the will, in showing that the testatrix meant the Synod's Board of Domestic Missions, or the Treasurer of that Board; and the board and their treasurer being parts of the organization of the corporation which claims the legacy, the conclusion is that it was intended for that corporation, to be used in domestic missions, under their charge and direction.

There are many reported cases in which the extrinsic evidence relied upon was as much, or more open to doubt than it is here. I will only refer to *Beaumont v. Fell*, 2 P. Will. 140; where a

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legacy to *Catherine Earnley* was decreed to *Gertrude Yardley*; *Abbot v. Massie*, 3 Ves. 148; where the legacy was to "Mrs. G.," and it was given to "Mrs. Gregg" on proof of intent; also *Careless v. Careless*, 1 Merivale, 383, (291;) where the legacy was to the testator's nephew Robert, the son of *Joseph Careless*; the testator had no brother Joseph, but he had a brother John and a brother Thomas, and each had a son Robert; and on the proof, the legacy was adjudged to Robert the son of John Careless. And see *Parsons v. Parsons*, 1 Ves. Jr. 266; *Baugh v. Read*, 1 ibid. 259, per Lord Eldon; *Smith v. Coney*, 6 ibid. 42; and *Mann v. Executors of Mann*, 1 J. C. R. 234, per Chancellor Kent.

All the legacies in question are sustained in favor of the respective claimants, and there must be a decree declaring the construction of the will accordingly. The costs of the parties will be paid out of the estate.

STARR v. E. and W. M. STRONG.

It is not necessary that an actual payment should be made, in order to protect a purchaser, except where there is a prior equity which is injured or affected by the legal title acquired by the purchaser. As against all subsequent equities, as well as liens, the giving of securities for the price, is a payment which gives to him the character of a purchaser in good faith.

Where a father, whose debts both as principal and surety were less than his property, and who had no expectation of being charged with the debts for which he was surety, conveyed his farm to his son, and for the price received a note and mortgage on the farm for its full value, payable in twenty-six equal annual instalments; *Held*, that the circumstances did not establish a fraud as against the creditors of the father.

June 19; August 29, 1844.(a)

THIS was a judgment creditor's suit, as against Eli Strong, and it sought to avoid as fraudulent, a conveyance of his farm in Orwell, Oswego County, made by him to his son William M.

(a) Affirmed on appeal by the Chancellor in October, 1844.

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on the 9th of February, 1838. At that time Eli S. stood as the accommodation indorser of a mercantile firm, for about \$600 on notes then running, upon which the complainant's judgments were afterwards recovered. He was also liable upon another note of \$386 of which half was his own debt, and he owed William M. about \$300. His personal property was worth a little more than that sum, and the farm was worth about \$1500.

In payment for the farm, William M. gave his mortgage on the same, together with a note, for \$2600 payable in equal annual instalments of \$100 each, without interest. The mortgage was recorded in May, 1838, and in December, 1838, Eli S. having become embarrassed by his indorsements, assigned the note and mortgage for the benefit of his creditors.

The answer of the defendants denied the charges of fraud contained in the bill.

Reference is made to the opinion for some additional facts.

There were several other questions raised in the case, which are omitted in the report of the decision.

G. N. Titus, for the complainant.

W. Curtis Noyes, for the defendants.

THE ASSISTANT VICE-CHANCELLOR. (After disposing of the prior points, proceeded thus.)

The terms of the sale from Eli Strong to his son, constitute the next ground of the charge of fraud.

It is urged that the conveyance was voluntary, and that W. M. Strong was not a *bona fide* purchaser.

This is in no sense a *voluntary* conveyance. A full price was secured to be paid, by the note and mortgage. No interest, present or future, was reserved to the son, in those securities, and they have since gone to E. Strong's assignee.

It is not necessary that an actual payment should be made for the land, in order to protect a purchaser, except where there is a prior equity which is injured or affected by the legal title acquired by the purchaser. As against all subsequent equities, as well as liens, the giving of securities for the price, is a payment

which will give to him the character of a purchaser in good faith. See *Seward v. Jackson*, 8 Cowen, 406; *Jackson ex dem. Peek v. Peek*, 4 Wend. 300. Here the complainant had no lien nor any equity which affected the premises when W. M. Strong received his deed.

Then as to the terms of the sale in question. The mortgage was given for the whole purchase money, and it was made payable in twenty-six equal yearly instalments, without interest.

It is not claimed that W. M. Strong pays in this mode, an inadequate price. But the term of credit is very unusual.

This is true, but it is not unheard of. A case was argued before me at the late March term, in which a mortgage for the purchase money was made payable at the end of twenty years, with no intervening payments, except interest. It was a transaction between strangers, a matter of business, the good faith of which was not questioned.

Here the parties were father and son. The father retiring from active life, gave to the son a liberal opportunity to pay for this little farm, in sums which would suffice for his wants to the probable end of his days.

Such transactions are not infrequent in a farming population, as the reports of our courts, as well as our experience teach us.

The evidence in this case shows that when this arrangement was made, there was nothing in E. Strong's situation to lead him to imagine that he would have to pay the complainant's debt, or any other debt of A. Strong & Co. If he had been loaded with debts of his own, and suits commenced against him, the terms of the sale would have afforded just ground of suspicion and scrutiny. But regarding the parties as they were in February, 1837, and especially as they believed they were, the length of credit does not in my judgment, go far towards impeaching the sale.

There was one circumstance which at first struck me as suspicious, which was that the debt to the son should be left outstanding, instead of being applied in payment of a part of the purchase money of the farm. But the absence of any motive in February to commit a fraud, takes away the force of this circumstance also. The arrangement as made, was consistent with the father's object, in having the payments equalized over so many

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years, as stated in the answer, and with an expectation or even agreement at the same time that W. M. Strong would take the personal property for that debt. With such a view, it was unimportant whether he closed that purchase in February or in May.

The publicity given to the sale and its terms, by recording the deed and mortgage, go far to rebut the suspicion of fraud from the circumstances to which I have adverted.

And it effectually repels the suggestion made by the complainant, that the operation was designed to secure to E. Strong a future benefit out of his property to the exclusion of his creditors.

The mortgage was as open to their pursuit, as the land was before the sale. It is not as was argued, postponing the creditors twenty-six years, or even one year. They could sell the mortgage in less time than they could perfect a title to the land on their judgment. And I have no evidence that the mortgage would not at a forced sale, produce as much as the farm would.

The subsequent disposition made of the mortgage does not indicate any fraudulent intent in the outset, but the contrary. Early in July, 1838, the complainant might have exhibited a creditor's bill against E. Strong, and if Strong had been so much on the alert as is charged upon him, he would have been fully informed of the complainant's progress, and placed the mortgage beyond his reach. Instead of pursuing that course, the mortgage continued in his hands till the ensuing December, when it was assigned for the benefit of his creditors generally.

Upon a careful examination of the case as it is disclosed by the pleadings, I cannot find any sufficient indications of fraud to overcome the force of the answer. And as there has been no property of the judgment debtor discovered by the suit, the bill must be dismissed as to both of the defendants.

VAUPELL V. WOODWARD.

Where the defence to a contract stated in a bill, is that it was not in writing, the answer must set up such defence as a *fact*, and put it in issue distinctly. When the answer admits the making of the agreement alleged in the bill, without asserting that it is not in writing and that it is therefore void by the statute of frauds, the defendant cannot object to the contract on that ground at the hearing.

Stating in the answer that the contract is void in law and that the defendant is not bound to perform the same, is not sufficient to enable him to avail himself of the statute of frauds, or to put the complainant on proof of a contract in writing.

A pledgee may file a bill to obtain a sale of the pledge for the payment of his demand. And although the demand be for unliquidated damages, it is not necessary to assess such damages at law before proceeding in equity for a sale.

On a sale of shares of stock in an incorporated company, deliverable at a future day, it is not necessary that the vendor, in order to recover damages on the refusal of the buyer to receive the stock, should immediately make a re-sale of the stock and an actual transfer of the same.

On such a sale, no tender of the stock is necessary in equity, when the purchaser, on the day it is to be completed, avows that he will not receive it.

Railway shares not within the English statute of frauds against parol contracts—in note.

September 16 ; 30, 1844.

THE complainant sold to the defendant, two hundred shares of the stock of an incorporated rail road company, at a stipulated price, deliverable at a future day, and to secure the performance of the contract, each party deposited 100 shares of similar stock with Dykers & Alstyne, brokers. When the contract matured, the defendant declared that he would not receive the stock bargained for, and no tender or offer of it was made to him. The complainant's damages by reason of the breach of the contract were proved to be \$592 50.

He filed his bill, stating the making of the contract and its breach, and the pledge of the 100 shares of stock as security ; and praying that the same might be sold and his damages paid out of the proceeds.

The defendant in his answer, denied that the complainant had any stock of his own when he assumed to sell the 200 shares, and alleged that when the same were deliverable he had not

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enough to fulfil all his contracts then due for the delivery of such stock; also that the contract was void in law and not binding upon him; that there was no tender of the stock, and that there was a sufficient remedy at law; and some other matters, which are stated in the opinion of the court.

The cause was heard on pleadings and proofs.

D. D. Field, for the complainant.

A. Mann, Jr. for the defendant.

THE ASSISTANT VICE-CHANCELLOR.—The first objection to the complainant's claim, is on the ground that the contract between the parties is not in writing subscribed by the defendant. The bill alleges that the parties entered into a contract, by which one agreed to sell to the other, 200 shares of stock upon terms which are fully stated. The answer admits the making of the contract as set forth in the bill.

On this state of the pleadings, the court has nothing to do with the question whether the contract is in writing or by parol. The Chancellor's decision in *Cozine v. Graham*, 2 Paige's R. 177, is conclusive that where it does not appear by the bill that the contract is not in writing, the defendant admitting the contract, must insist by plea or answer that it is not in writing, or he cannot raise that objection to its validity. And in such case no proof of the agreement is necessary.

The defendant relies upon the clause in his answer, in which he insists that "the contract is void in law and that he is not bound to perform the same."

On reading the answer I supposed this point was addressed to the allegation that the complainant did not own stock enough to fulfil his time sales, including the one in question.

Be that as it may, it is clear that it does not set up the statute of frauds so as to put the complainant upon proof of a contract in writing. The defence that an agreement, admitted to have been made, is not in writing, must be pleaded or set up in the answer *as a fact*, and distinctly put in issue. This is the essential point, and this is not pleading the law, but pleading a fact

to which the law attaches the consequence that the contract is void.

The next objection made by the defendant is that the remedy of the complainant is at law; and that he must at least establish there his right to damages, before resorting to the stock delivered to Dykers & Alstyne.

As to this, it is to be observed that the deposit of the stock constituted a pledge. (See *Cortelyou v. Lansing*, 2 O. C. in E. 200; *McLean v. Walker*, 10 Johns. 471; *Garlick v. James*, 12 *ibid.* 146.)

And it is well established that the pledgee may file a bill in equity to sell the pledge and thereby obtain payment. (4 Kent's Comm. 139, 2d ed.; 2 Story's Eq. Jur. 298, § 1033; Story on Bailments, 208, § 310; *Hart v. Ten Eyck*, 2 J. C. R. 62.)

I find no authority which requires the pledgee to assess his damages at law, before coming into this court. Nor can I perceive any good reason why the parties should be subjected to the expense of a suit at law for that purpose, when it can be accomplished without additional expense in the proceeding here which must ensue before the creditor can obtain payment.

In this case, although the pledge was sold by consent, the proceeds remained in the hands of the depositaries, inaccessible to the complainant through any proceeding at law. His recovery of damages for the breach of the agreement in a suit against the defendant, would not affect the pledge, nor compel Dykers & Alstyne to pay the recovery out of its proceeds.

Another objection was made, that the complainant should have proved a tender of the stock at the maturity of the contract; and farther, that he should have proved a re-sale and actual transfer of the stock at that time.

As to the tender, it appears by the defendant's letter to Dykers & Alstyne on the day the contract fell due, that he would not receive the stock, and no tender was necessary.

As to the other point, it is founded on the argument that the object of the act against stock-jobbing will be wholly defeated unless brokers selling stocks on time are required to prove a re-sale before bringing an action against the purchaser for not ac-

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cepting. For it is said, a broker with 100 shares of a particular stock, may make half a dozen or more sales of 100 shares of that stock to as many different persons on time, and on their failure to perform, might sustain a suit against them, all upon proof of his having owned the 100 shares. It may be said too, that if all the buyers should fulfil and demand their stock, his 100 shares would not go far towards completing on his part.

The English stock-jobbing act, it appears contains a provision requiring such a re-sale on these time contracts.^(a)

This circumstance, while it shows the wisdom or propriety of further legislation on the subject, also shows that the evil must be remedied by legislation and not by judicial construction.

Except as regulated by our statutes, the sale of stocks stands upon the same footing as the sale of other goods and chattels. The statute contains no requisition for a re-sale, and I cannot enlarge it in order to remedy any supposed defect or omission.

The complainant is entitled to a decree for the payment of the amount of the damages as agreed upon, and the costs of this suit, out of the fund in question.

(a) See *Wells v. Porter*, 2 Bing. N. C. 722; 3 Scott, 141; and *Hewitt v. Price*, 3 Railway and Canal Cases; 175. On the point which was argued at the bar that the contract was within the statute of frauds, (assuming it to have been by parol,) see *Duncrest v. Albrecht*, 12 Simons, 189, affirmed by the Chancellor, July 23, 1841; in which it was decided that railway shares in an incorporated company were not an interest in lands, nor goods or chattels, within the statute of frauds and perjuries, and that the court will enforce specifically a parol agreement for their sale.

GALLIANO v. LANE and others.

A married woman seized of land in her own right, executed a deed in her maiden name, dated prior to the marriage, which was proved by a subscribing witness and then recorded. The deed was set aside as invalid, both because it was not acknowledged by her in the form prescribed by law, and because her husband did not join in it, or execute a concurrent conveyance. The guardian *ad litem* of an infant defendant, in whom the invalid title in part rested, was directed to join in a re-conveyance, executing it for and in the name of the infant.

October 7, 1844.

THE complainant, then Elizabeth A. Cooper, was married to John Galliano, on the 23d day of August, 1838, at which time she was the owner in fee of the house and lot No. 185 Broome-street, in the city of New York. Difficulties arose between her husband and herself soon after the marriage, in consequence of which she sought to have the house and lot secured from his control, so that she might enjoy it during her life, and after her death that it might vest in her brother and sister, John and Louisa Lane. The defendant, G. Kent, assumed to be her adviser and manager in the affair, and she first executed a will, which he presently informed her would be unavailing. He then induced her to execute a deed of the house and lot to her brother and sister, in order to accomplish the same object. This deed was in fact executed about the first of January, 1839, but was dated ten days anterior to the marriage, and was made in her name of Elizabeth A. Cooper. It conveyed the whole premises absolutely. After it was signed, its execution was proved by a subscribing witness before a commissioner, on the fourth day of January, 1839, and upon that proof it was recorded the same day. No consideration was paid to Galliano or his wife, and the Lane's were both infants.

On these facts, Galliano and wife, on the 17th of May, 1839, filed their bill against Kent, and John and Louisa Lane, to set aside and cancel the deed. Kent appeared and answered the bill, admitting the material facts charged.

Before an appearance had been perfected by the infants, and on the 8th day of February, 1843, the complainant obtained a decree against her husband dissolving the marriage contract.

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She then filed a supplemental bill in her own name, against the same defendants, in which it was stated that John Lane had become of full age. The bills were then taken as confessed by John Lane. An answer was put in in behalf of the infant, Louisa Lane, and proofs taken.

H. Hunt, for the complainant.

J. H. Applegate, for Louisa Lane.

THE ASSISTANT VICE-CHANCELLOR, said the proof was clear that the deed was executed while the complainant was a married woman, and not being acknowledged by her in the manner prescribed by law, was entirely invalid. It was equally objectionable, because her husband was not a party to it, or conveying concurrently with her. But in consequence of its being ante-dated, and thus appearing to be a deed executed by her before her marriage, it has the semblance of a perfect conveyance, which she is entitled in this court to have set aside, and her title cleared of the cloud thus thrown over it.

A decree was made, declaring the deed to be void and of no effect, and directing a re-conveyance by John and Louisa Lane. The guardian *ad litem* of the latter was directed to execute the deed for her and in her name.

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W. being seized of lands subject to a mortgage, which had not been executed by his wife, conveyed them to D., his wife joining with him in due form. D. subsequently reconveyed them to W.

Held, that the wife's inchoate right of dower was extinguished by the deed to D. and was not restored as against the mortgage by the reconveyance; and that she was dowable of the equity of redemption only.

October 7, 1844.

THIS was a bill to foreclose a mortgage executed by A. Watt to the complainant. It appeared that after the mortgage was

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given, A. Watt and his wife joined in the execution of a deed, by which they conveyed the mortgaged premises in due form to R. P. Dana. Subsequent to this period and before the bill was filed, Dana re-conveyed the premises to A. Watt. Mrs. Watt put in an answer, claiming her dower right in the whole premises, unaffected by the mortgage. The complainant insisted that she was dowable in the equity of redemption only.

S. Jones Mumford, for the complainant.

C. W. Van Voorhis, for Watt and wife.

THE ASSISTANT VICE-CHANCELLOR, remarked that the proofs show Mrs. Watt joined her husband in the conveyance of the lands in question to Dana; upon which Dana had the whole title, discharged from any claim for dower, but subject to the complainant's mortgage. When he conveyed to A. Watt, he therefore transmitted the whole title to him, subject to the mortgage. All the right which Mrs. Watt has in the premises, is derived from that conveyance, which vested the equity of redemption and nothing more, in her husband. She has therefore, no interest beyond an inchoate right of dower in the equity of redemption.

Decree accordingly.

HOLFORD v. BLATCHFORD, Receiver of the Commercial Bank.

Foreign exchange is a commodity which is bought and sold, like merchandize. The thing sold by the drawer of a foreign bill, is his money or funds abroad, or, what to the payee is equivalent, his credit abroad, equal to cash. The bill of exchange is the instrument of transfer.

From the nature of foreign bills, their sale by the drawer and their transfer by the payee, usually precede acceptance. And whether the contract for the sale of such a bill, be deemed an agreement to draw the bill, or one in respect of the bill already drawn; it is equally the sale of an existing *thing in action*, and legal.

Such a contract stands upon a different footing from one for the sale of promissory notes and inland bills of exchange previous to their being issued or put in circulation. Notes and inland bills are not the subject of sale, except when held by one who can maintain a suit upon them against the other parties at maturity.

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Bankers checks and drafts, or inland bills at sight, are in this respect, similar to foreign bills of exchange.

A bill drawn by a house in New York on a house in London, the partners in both houses being the same persons, is the legitimate subject of sale in the hands of the drawers.

A commercial house in New York drew their bills of exchange, on a house in London, and sold them on a credit, to the payees, before acceptance, for a price which was $2\frac{1}{2}$ per cent. beyond the then current price of exchange between New York and London. There was no allegation that it was a loan, or a cover for a loan.

Held, that the transaction was not usurious. The charge of one and a half per cent. beyond the cash price of the exchange, did not make the transaction usurious.

On an application to purchase foreign bills, on credit, the drawer demanded nine and a half per cent. premium, one per cent. commission, and interest on the whole till paid. *Held*, on the testimony, that the commission was a part of the stipulated price of the bills, and was not to be deemed a compensation for forbearance or giving day of payment, and that the contract was not usurious.

If the commission had been included for forbearance, *quære* whether it should not be construed as two distinct contracts: 1. For the sale of exchange at $9\frac{1}{2}$ per cent. premium; and 2. An agreement to forbear payment of the price for sixty days, in consideration of the legal interest and one per cent. commission?

The bill set forth a sale of exchange *at the current rate, for the price of which, a certificate of deposit was given*. The suit was for the recovery of the price, and the proof showed that the sale was made for $1\frac{1}{2}$ or $2\frac{1}{2}$ per cent. more than the current rate of exchange. The certificate having been given for the amount at that rate: *Held*, that there was no variance between the bill and the proof.

Where the answer states a contract as a sale and purchase of foreign exchange, without any averment that it was a cover for a loan, or that there was an application for a loan which assumed the form of a sale, the defendant cannot prove those facts, or insist upon them, although he has inserted a general allegation that the contract was usurious.

September 23, 24, 25; October 3, 1844.

THE bill was filed by Holford, Brancker & Co., merchants in New York, to recover of the receiver of the Commercial Bank, the price of certain bills of exchange for 8000*l.* sterling, drawn by themselves on Holford & Co., bankers in London, in March, 1841.

The bank gave a certificate of deposit for the price of the bills, including $9\frac{1}{2}$ per cent. for the premium of exchange, and one per cent. for commission. The certificate was payable on demand, but by agreement, was to be paid in sixty days, with interest.

At the end of four months, the bank made a payment on account, and gave a new certificate for the balance, in which was

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included a commission for forbearance. The same thing was repeated in September, 1841.

The defence was that these transactions were void for usury.

The answer alleged, that the application for the bills was originally made to the complainants by the North American Trust and Banking Company, and the same terms agreed upon; but in consequence of the complainants rejecting the securities offered, the Commercial Bank stepped in and obtained the exchange for the Trust and Banking Company, receiving the securities from the latter, and giving their own certificate to the complainants for the stipulated amount. That the stipulation was for a premium of $9\frac{1}{2}$ per cent., which was $1\frac{1}{2}$ per cent. beyond the current rate or market price of exchange at that time, besides the exaction of a commission of one per cent.; and the certificate was given for the aggregate amount, and interest was to be paid for the time it was to be forborne.

The answer also insisted that the excess above the market price, was charged by the complainants with the intent to evade the statute against usury, and at the same time to secure more than seven per cent. interest on the loan or forbearance of money. The same allegation was made in respect of the commission. Some other points of the pleadings and evidence will be found noticed in the opinion of the court.

J. Prescott Hall and *George Griffin*, for the complainants.

E. H. Blatchford and *B. F. Butler*, for the defendant.

THE ASSISTANT VICE-CHANCELLOR.—The contract upon which the complainants claim a decree, is not very fully stated in the bill; but so far as the particulars are given, I do not think that they are substantially variant from the contract proved.

The bill sets forth a sale of the complainant's bills of exchange on the house of Holford & Co., London, for £8000 sterling, at the then current rate of exchange, and that they received the certificate of deposit of the bank for the price of such bills of exchange.

The objection is that the sale proved, was at the rate of $9\frac{1}{2}$ per

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cent. premium, whereas the current cash rate of exchange was only eight per cent. ; and besides this excess of premium, the complainant's contract as proved, included interest at the lawful rate for the term of credit given, and a commission of one per cent. for the forbearance of payment during that term.

Whether there was a commission included in the original contract, is a disputed fact which I will consider presently. I do not think it material on the point of variance.

The allegation of a sale of bills of exchange, or of any other article, at the current rate or price, is not definite or certain, because the current price is almost universally to be found between two limits. Thus, on the day that I am writing, exchange on London is quoted at $9\frac{1}{4}$ to 10 per cent. premium. But a statement that bills were sold and a certificate of deposit given for their price, is definite, and by reference to the certificate, absolutely certain.

In this bill, therefore, the most material statement, as to the sum which the bank was to pay the complainants for the bills, is that relating to the certificate. The expression, "then current rate of exchange," is not set forth as the terms or very language of the contract. It is descriptive of the price, and is subordinate to the more definite description which is given by reference to the certificate. In applying the proof the latter must control, and thus applying it, there is no variance.

If there were a variance, it will not affect the defendant's right ; inasmuch as there is no surprise in the case, and the court would permit the complainants to amend their bill upon terms, so as to obviate the defect ; as was directed in the case to which I was referred by the defendant's counsel. (*Harris v. Knickerbacker*, 5 Wend. 638.)

The defence which has been interposed in the discharge of the defendant's duty to the creditors of the Commercial Bank, is that the original certificate, and the contract on which it was given, were usurious.

And 1. It is urged that the object of all the parties, was to enable the bank to raise money for the benefit of themselves and the North American Trust Company : That the transaction was a loan in disguise.

As to this ground of the defence, I am spared the necessity of examining it, because it is not set up in the answer. I find no allegation in either the first or the supplemental answer, that the original transaction was a loan, or a cover for a loan; or that there was any application for a loan, made by the North American Trust Company, or the Commercial Bank. The answers speak of a sale and purchase of bills of exchange. They present as a defence, that the transaction was made for the North American Trust Company, without any authority on the part of the officers of the bank who assumed to act, and that the complainants had notice of the defect of authority. That for the forbearance of the debt, or price of the bills of exchange sold, the complainants exacted $2\frac{1}{2}$ per cent. beyond legal interest, of which $1\frac{1}{2}$ per cent. was under the garb of the premium for the exchange, and one per cent. was called commission. And that upon the renewals of the certificates, there was a further exaction of unlawful interest.

But the answers do not allege, that there was any loan solicited or made.

I am limited to the issues made by the pleadings in the cause, and must lay out of view the first ground presented by the defendant's counsel at the hearing.

2. The next objection to the transaction, is that the complainants bills in their own hands, had no legal existence, and could not be the subject of sale; and it was therefore a mere exchange of credits, and the taking of $1\frac{1}{2}$ per cent. (or $2\frac{1}{2}$ per cent. if the commission were included,) above the current rate of exchange and in addition to the legal interest, was *per se*, usury.

The Dunham cases were referred to, to show that where on an exchange of notes, the party loaning his credit, reserves a commission exceeding the lawful interest, the transaction is usurious. (13 Johns. 40; 16 *ibid.* 367; 5 J. C. R. 122.) And it was contended that a bill or note cannot be the subject of sale, unless it be such a security in the hands of the seller that he could maintain a suit upon it at maturity. This distinction is well settled in regard to promissory notes. (*Powell v. Waters*, 8 Cowen, 689; *Cram v. Hendricks*, 7 Wend. 569.)

In *Munn v. The Commission Company*, 15 Johns. 44, the Vol. II.

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same distinction was applied by the Supreme Court to an inland bill of exchange.

All these were cases of the discounting of notes and bills ; the advance of money by the purchaser to the seller or borrower. And the real point to which this distinction was addressed, was to ascertain whether the transaction was a loan on paper made for the purpose and then first used, or whether the paper was previously in existence and operative. In other words, whether it were in fact, a loan, or a sale. It might be a loan, although the person discounting the note supposed he was buying a business note, as is shown in *Powell v. Waters*.

I think that this distinction is not applicable to the sale of foreign exchange. The contract in this instance was, in truth, an agreement by the complainants to draw foreign bills for £8000, in consideration of which the Commercial Bank agreed to pay them the stipulated amount, whether that were $9\frac{1}{2}$ per cent. premium and a commission, or $9\frac{1}{2}$ per cent. without the commission. And the drawing of the bills was a part performance of that agreement.

Both in theory and practice, the contract was complete in all its parts, before any bill of exchange was drawn.

Then what was sold ? The answer is, Holford, Brancker & Co.'s agreement that Holford & Co. would pay to the Commercial Bank, £8000 sterling in the city of London, at the end of sixty days after presentment, and that Holford, Brancker & Co. would deliver to the bank, the usual medium of transferring exchange, viz. their bills on the London house. The thing sold was money or funds in London. The bills were the instruments of transfer.

But it may be asked, wherein does this differ from an agreement by which A. is to obtain B.'s note for \$100 at six months, and deliver it to C. for \$90, or any other price ? I answer that a note is a promise to pay a fixed sum, and whether paid at maturity or not, no additional sum can be demanded upon it.

Foreign exchange is an undertaking by the drawer in one country that a person in another country shall pay money there at a time stipulated ; and if the latter fail to pay, subjects the drawer to heavy damages, in addition to the amount designated in the bill.

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So when a note is drawn and delivered, the maker is liable simply for its amount, and ultimately at the place where he resides. When a foreign bill is drawn and delivered, the drawer is liable to provide for its acceptance and payment abroad, or to pay its amount at home with the damages added.

A contract to make a promissory note and sell it at a stipulated price is not the subject of traffic in the market.

But a contract for the sale of exchange on a foreign town at a rate agreed upon, is a familiar mercantile transaction. It is a commodity which is bought and sold like merchandize, and in all large cities a distinct class of merchants is usually devoted to this branch of commerce. In this instance the exchange sold, whether considered before the bills were drawn, or after they were signed but while they still remained in the hands of the complainants, was in existence and was the subject of sale. It was either funds of the drawers in London, or their credit at that place equivalent to cash.

The circumstance that the drawer of the bills in question was one of the partners in the drawee's house, cannot affect the point in reference to their legal existence while in the drawer's hands. They would have been in the same plight, if drawn upon another and distinct firm.

From the nature of foreign exchange, it must be sold and remitted, in the usual course of trade, before it is accepted. It therefore performs all its functions in the country where it is drawn, before it receives the signature, and thereby the liability of the party who is in theory the real debtor in the transaction. I refer to its acceptance. In its legitimate operation it is frequently sold but once. The merchant having occasion to pay money in England, applies to a banker here who deals in exchanges, buys his bill on a banker in London, which the merchant remits directly to his creditor in England, who in due course, obtains the acceptance of the London banker. To say of this transaction, that the bill or the exchange, had no legal existence when it was sold by the banker here, appears to me to be entirely erroneous.

This question has been decided in this circuit, and by authority which would control me unless my judgment was clearly at variance with the decision. If I were merely in doubt, I should

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feel bound for the sake of uniformity in the administration of justice by co-ordinate tribunals, to follow the authority of my predecessor and the Vice-Chancellor.

My conclusion coincides fully with theirs. In *Manice v. The New York Dry Dock Company*, 3 Edw. Ch. R. 143, the Vice-Chancellor held that bills of exchange in the hands of the drawers, were the legitimate subjects of sale. The same decision was made by my learned predecessor, when that case came before him for a final hearing on the merits. (See 3 Edw. 152, note a.)

A similar decision was made by the very learned and venerable Chief Justice of the New York Superior Court in the case of *De Launay v. Manice*, which is not reported. And that was an instance in which the drawers in this city, and the drawees in France, were the same persons, having mercantile houses in both countries.

The same judge, when Chancellor, delivered the leading opinion in the Court for the Correction of Errors in *Powell v. Waters*, and he there commented on *Munn v. The Commission Company*, which was the only instance of an inland bill having been subjected to the rule as to promissory notes which have not been negotiated. It is evident, from his decision in *De Launay v. Manice*, that this great jurist when deciding *Powell v. Waters*, did not imagine that a foreign bill of exchange was to be brought within the distinction there taken.

The inland bills of exchange on time, which are in use among us, partake of the character of both loan and exchange. When legitimate, they are drawn in anticipation of funds which are to result at the place of payment, from future sales of produce or the collection of debts there; and are put in circulation to be discounted, and thus to furnish the drawers with the funds in advance of such sales or collections.

These bills are of course unlike foreign exchange. But there is another class of inland bills which are in this respect entirely analogous to foreign bills. I allude to the bills of exchange of the country banks and bankers, usually called bank drafts, which are drawn on their funds in the cities on the seaboard, payable at sight, or some few days after sight, and sold at a premium for the purpose of remittance.

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In the *Cayuga County Bank v. Hunt*, 2 Hill, 635, the Supreme Court recognized the legality of this very common transaction, where the bills sold were paid to a borrower, in lieu of cash, on a discount of his securities. And see *Merritt v. Benton*, 10 Wend. 116.

The same principle will uphold the sale in question, as being a sale of an existing thing in action, whether it be regarded as an agreement for exchange, or a bill of exchange already drawn up. I must therefore decide against the second point made in the defence.

3. The next objection is, that admitting the bills of exchange to be a subject of sale, yet the complainant's exaction of one and a half per cent. beyond the current rate of exchange, besides interest on the aggregate amount of the bills and the premium taken, was a mere colorable device to obtain more than lawful interest for the forbearance of the price of the bills during the stipulated term of credit.

On this point the decisions in the case of *Manice v. The Dry Dock Co.* before cited, are decisive against the defendant.

Under the pleadings, I am to treat the contract as a sale merely, and it would be extravagant to hold that the charge of $1\frac{1}{2}$ or $2\frac{1}{2}$ per cent. beyond the cash price on a sale of exchange on credit, in addition to interest on the price, was a device to cover usury.

It is true the witness who was examined to the point, places the enhanced charge in such cases on two grounds only, viz.: the doubtful standing of the purchaser, and the probability of a rise in the value of exchange; and as to the first, it is proved that the bank was in good standing at the time of the sale, and there is no evidence of increase in the value of exchange being then probable.

But the well known difference between the cash and credit price on the sale of merchandize, does not rest wholly upon these grounds. Although the purchaser may be in perfectly good credit, the vicissitudes of trade may overtake him before the term of credit will expire. Whereas on a delivery of the goods, and the receipt of the price in money, there is no risk of loss; and in reference to a rise in the value of the article, the

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seller may with the price received, replace it by another purchase.

Accordingly it is notorious that the difference in price on a cash and credit sale, almost invariably exceeds the amount of the interest on the price during the stipulated credit. The deduction of *five per cent. for cash*, has acquired nearly the force of usage in many branches of trade.

Assuming that the difference between the cash price and credit sale in the case before me was $2\frac{1}{4}$ per cent., which would include the commission, it was no more than the usual charge of a factor for guaranteeing the sale of goods. And probably no more than the complainants would have been compelled to pay, if they had obtained a responsible guaranty of the payment of their first certificate from a third person.

The enhanced price of the bills of exchange cannot for these reasons be deemed a colorable device for usury.

4. There is still another objection to the validity of the transaction, which was pressed with much force.

It was said that the proof is conclusive that in addition to the $1\frac{1}{2}$ per cent., the alleged difference between the cash and credit price of exchange, the complainants took for the forbearance of the price a commission of one per cent.: That the price of the bills became a debt which was forborne, and for the forbearance of which more than lawful interest was taken; and that the contract is therefore usurious, even if it be regarded as involving a sale of exchange.

The fact, whether the commission formed a part of the first certificate of deposit, is involved in much doubt and contradiction; and before looking into it, I will inquire whether assuming that the commission was agreed upon at the time of the sale, it does of itself, or under the circumstances, render the transaction usurious.

First. I think it may be safely asserted that if the commission were a part of the price of the bills, usury cannot be predicated of it. There being a sale, and not a loan, it is only in respect of the forbearance, that the charge can be deemed illegal.

The testimony, (including the statement of Mr. Brancker to his clerk, which the defendant's counsel finally resorted to,) es-

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tablishes that the premium charged on the bills was $9\frac{1}{2}$ per cent. And there is no dispute but that interest was to be paid on the aggregate sum included in the first certificate.

On the other hand, Mr. Strong, the president of the bank, who negotiated the purchase of the bills, testifies distinctly, that if a commission were charged on the sale, and included in the first certificate, it was a part of the original contract of sale of the exchange; that the amount expressed in the first certificate was the price which the bank agreed to pay for the exchange at the end of sixty or sixty-three days from the time of the purchase; and that they agreed to pay that amount as the price of the exchange. At first I was inclined to look upon the £8000 reduced to federal currency, with $9\frac{1}{2}$ per cent. added thereto, as *the price* of the exchange, properly so called; and to rank the commission, (if any were then agreed upon,) with the interest stipulated, as the price of the forbearance. But upon further consideration, I think that the commission is to be deemed a part of the price of the exchange.

It was a sale of the bills on a credit. When the application was made by the purchaser, the terms given were, $9\frac{1}{2}$ per cent. premium, 1 per cent. commission, and interest on the whole till paid. These terms, then, were the price which the sellers asked for their bills. If they had asked 12 or 13 per cent. by the name of premium, besides interest, the case of *Manice v. The Dry Dock Co.* shows that it would have been lawful. I do not perceive how it can be any the less legal, because they asked $9\frac{1}{2}$ per cent. by the name of premium, and 1 per cent. by the name of commission. Certainly, the names imposed, cannot affect the merits of the contract, so long as it appears that the thing which they represent was the price of the article sold.

The case of *Beete v. Bidgood*, 7 B. & C. 453, (1 Mann. & Ry. 143, S. C. where the facts are reported more at large,) is also an authority for the complainants. There a contract was made by Beete and Newton, residing in London, for the sale of the undivided half of an estate in Demarara. It was recited that Beete had agreed for the absolute sale, &c., to Newton, "at and for the price or sum of 16,000*l.* sterling money, &c., being the balance of an account stated between them: which said sum of

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16,000*l.* together with *interest* upon the several promissory notes added thereto for the time they have to run, and which are written at the foot," &c. &c., "are to be in full of the said purchase money;" and that Newton had agreed to purchase the property, "at and for the said price of 16,000*l.* to be paid at the times, including the said interest to be added thereto by the instalments, and in the manner specified in the said several promissory notes," &c. At the foot of the contract; Beete signed a receipt acknowledging to have received of Newton the seven notes thereafter mentioned, "being the amount of the said sum of 16,000*l.*, the money agreed upon for the said purchase," &c., "together with the *interest* on the said sum of 16,000*l.* added thereto for the time the respective bills have to run, *making in the whole, principal and interest, 20,000*l.**"

Then followed the seven notes, upon one of which the suit was brought. The interest computed in the several notes was at the rate of six per cent. per annum, being the legal interest of Demarara. The defence was that the contract was usurious; and it was urged that the consideration was 16,000*l.*, and was so stated; the six per cent. was expressly called interest, not purchase money, and the parties treated the 16,000*l.* as principal, and the residue as interest.

The court decided that there was no usury. Lord Tenterden said, that the agreement arose out of a contract of sale, not out of a contract of loan; though the parties have calculated the price partly in what they considered the value in present money, and partly in money to be paid at a future day. That the whole difficulty was created by their calling the difference "interest." If they had said, "payable by instalments," there would have been no doubt. It was the duty of the court to look not at the form and words, but at the substance of the transaction. And that in substance this was a contract for the sale of the estate at the price of 20,800*l.*, (the aggregate amount of the seven notes,) to be paid by instalments.

It will be perceived that the court in *Beete v. Bidgood*, construed the transaction in spite of the words used, to be in effect what Mr. Strong testified the contract was in this case; and the

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"interest" there, like the "commission" here, was a part of the price.

This case was cited with approbation by the majority of the court in *Kelchum v. Barber*, 4 Hill, 224, 228.

In *Floyer v. Edwards*, Cowp. 112, the sale was on three months credit, with an agreement for more than the legal interest, after that time, if the price were not then paid. This was held not to be usurious. At the trial some stress was laid upon an usage proved; but Lord Mansfield did not rely upon it in his decision, further than to show that there was no intention to cover a loan.

It is undoubtedly true that the charge of commission, as well as the whole machinery of the sale of the bills, may have been colorable, and mere devices to evade the laws against usury.

Where the question is presented by the issue, it is often difficult to ascertain whether the transaction were in truth a sale or a loan in disguise. Such were the cases of *Doe v. Brown*, Holt's N. P. Rep. 295, and *Glover v. Payn*, 19 Wend. 518.

These cases however show, that where the contract was clearly a sale, it cannot under circumstances like those before me be adjudged usurious. And such must necessarily be my conclusion here, where the transaction is brought forward as a sale.

Second. If I have erred in holding that the commission should be regarded as a part of the price, there is still another view which deserves consideration.

The transaction may then be construed as two distinct contracts; first, a sale of the bills at $9\frac{1}{2}$ per cent.; and second, an agreement to forbear payment of the price for sixty days on the payment of legal interest and one per cent. commission.

In that view, the case would be like those of *Pollard v. Scholly*, Cro. Eliz. 20; and *Evans v. Negley*, 13 Serg. & Rawle, 218.

The former was a sale of oxen, and an agreement by the buyer to pay more than legal interest for the forbearance of the money for a longer day. The agreement for the interest was held void, but the sale was good.

In *Evans v. Negley*, the parties as partners had erected a mill, and soon after it went into operation, Evans sold his half to his partner. The contract between them provided that the price

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should be \$8500, to be paid when it should be convenient, and in the mean time the purchaser was to pay to Evans "a *yearly rent*," of \$640. Any part of the purchase money which might be paid, was to abate the rent *pro tanto*. The mill was to be conveyed immediately. The agreement for the rent was held to be usurious, it being in effect interest reserved for the forbearance of the purchase money. But Evans recovered upon the covenants for the \$8500. The contract of sale was thus distinguished from the contract for forbearance, and relieved from the taint of the latter.

In fine, I am satisfied that there was no usury in the transaction in question, although the commission formed a part of the original agreement, and was included in the first certificate. It is therefore unnecessary for the decision of the points raised, to determine whether such were the fact, or whether as the complainants insisted, the commission was first brought forward in July, 1841.

There is no doubt but that the renewals of the debt, and the second and third certificates were usurious. These however do not affect the original sale, on which alone the complainants claim to recover.

There must be a decree for the contract price of the bills, with interest and the costs of suit. The two payments made on the renewals will be applied in reduction of the amount of the debt.

[On settling the decree, the Assistant Vice-Chancellor looked into the testimony, and decided that the commission of one per cent., as well as the premium of $9\frac{1}{4}$ per cent. was included in the first certificate, and the decree was made accordingly.]

BRADFORD v. READ.

The court of chancery does not decide upon the regularity of the proceedings of the supreme court.

Where in a judgment creditor's suit, the defendant put in issue the return of the execution issued out of the supreme court against his property, and the complainant produced at the hearing an execution with a proper return indorsed, which had been filed *nunc pro tunc*, as of a day prior to the commencement of the suit, pursuant to a rule of that court made on a motion without notice after the issue was joined in the creditor's suit, on the ground that the original execution had been lost on its transmission from the sheriff to the clerk; it was *held*, that the evidence sustained the issue on the part of the complainant.

The circumstance of its being relied on as a defence to the creditor's suit, would be no answer to such a motion in the supreme court, and ought not interfere with the force of the rule thereupon granted.

October, 12; 15, 1844.

THE bill was filed to reach the equitable interests and things in action of the defendant, against whose property, as the bill alleged, an execution at law had been returned unsatisfied. The charge in the bill was in the usual form; and the answer denied that any such execution had been returned or filed.

The proof showed that the sheriff made a return on the writ in due form and mailed it to the clerk of the Supreme Court at Albany to be filed. It however could not be found on file, and on motion, that court ordered a new writ and return to be filed in its place, as of a day anterior to the commencement of this suit. Some other matters are mentioned in the decision of the court.

B. G. Hitchings, for the complainant.

R. Ten Broeck, for the defendant.

THE ASSISTANT VICE-CHANCELLOR.—The defendant took issue upon the allegations in the bill that an execution against his property was issued and returned unsatisfied.

The proof of the issuing of the *feri facias*, its delivery to the

Bradford v. Read.

sheriff, his indorsing a return thereon, and duly mailing it to the clerk of the Supreme Court to be filed, is so clear that no question remains as to those facts.

In support of the charge in the bill that the writ was returned, the complainant produces an exemplification of such a writ with the direction and sheriff's return indorsed in proper form, and marked "filed June 10, 1843, *nunc pro tunc*, by order of court, Feb. 8th, 1844."

It further appears that on the day last mentioned, the Supreme Court made a rule directing such writ to be filed as of the tenth day of June, 1843, instead of the original *feri facias*, proved to have been lost or mislaid.

The defendant insists that this rule and the proceeding under it are a nullity in reference to him, because the rule was obtained *ex parte*, and after he had put in his answer.

As to its being *ex parte*, this court cannot regard such an objection. The defendant was apprised by the notice of reading the evidence, served upon his solicitor, nearly six months before the hearing, that such proceedings had taken place, and if they were void or irregular, he should have moved the Supreme Court to set them aside.

This court does not decide upon the regularity of the proceedings of the Supreme Court. (*Williams v. Hogeboom*, 8 Paige's R. 469; *Platt v. Cadwell*, 9 ibid. 386.)

Then as to the objection that the defendant had answered the bill. This too, I think, should have been presented to the Supreme Court. If the *ex parte* rule were improvidently granted, because it made no reservation of the defendant's intervening proceedings, he should have applied to the court to be heard in that behalf.

I am satisfied however, that the Supreme Court would not have annexed any condition to the granting of the rule, even if the defendant had been heard in opposition.

In *Seaman v. Drake*, 1 Caines' R. 9, that court ordered the judgment roll to be signed, *nunc pro tunc*, to sustain proceedings against the defendant's bail.

In *Close v. Gillespey*, 3 Johns. R. 526, the court amended the record, *nunc pro tunc*, so as to sustain an execution issued

on the judgment and levied, against a subsequent regular execution.

In *Chichester v. Cande*, 3 Cowen, 39, the record of judgment was mailed to the clerk's office, and the attorney relying upon its being filed in due course, issued an execution which was levied, and the defendant's property sold on that and subsequent executions. It turned out that the letter inclosing the judgment roll, miscarried, and no roll was filed or judgment entered or docketed till more than a year afterwards. On motion the court directed the record to be filed *nunc pro tunc*, so as to retain to the plaintiffs the priority of their execution. (And see *Hart v. Reynolds*, 3 Cowen, 42, note *a*.)

In the case before me, the defendant knew of the issuing of the execution, and he had refused to pay it to the sheriff when called upon, and alleged that he had no property liable to execution. He knew that it was the duty of the sheriff to have returned the writ, and if he had inquired of the sheriff, he would have learned that such duty had been performed. Under these circumstances the Supreme Court would have disregarded the vested right which his counsel claims that he has acquired by putting in his answer; and which is in truth only a right to defeat an undisputed debt, and subject the complainant to a bill of costs because of the loss of his execution, either in the mail or the Supreme Court clerk's office.

The case of *The Bank of Rochester v. Emerson*, before the Chancellor, October 17, 1843,^(a) to which I was referred, is an authority in favor of the complainant. The Chancellor, notwithstanding the wilful irregularity of the solicitor, would have imposed no condition in granting the usual relief to the complainants in that case, but for its interfering to deprive third persons of that equality between creditors which equity cherishes.

I am therefore bound to give to the exemplification produced, its full force as evidence; and it sustains the allegation of the return of the writ at the time stated in the bill.

I express no opinion upon the question discussed relative to

(a) Since reported in 10 Paige's R. 359.

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the writ which was mailed, having actually reached the Supreme Court clerk's office at Albany.

The complainant is entitled to the usual decree for the payment of his debt and the costs of the suit.

CLARK v. ELY and others.

Where a surety took a confession of judgment for his indemnity from the maker of two notes which he had undersigned, sold the maker's property on an execution thereon, and received the proceeds in the promissory notes of the purchasers of such property; *Held*, that he was in equity a trustee of the last mentioned notes for the holder of the obligations upon which he was surety.

And that on his transferring such notes, in payment of a precedent debt of his own, or as security for such a debt, the transferee could not retain them as against the prior equity of the principal creditor, on the faith of whose debt they had been realized. The latter has the prior and superior equity, and it must prevail over the legal title.

This was held in the case of a bank, which discounted the trust notes, and applied the proceeds on a subsisting indebtedness, but without relinquishing any security or property. And also in respect of a judgment and execution creditor, who received such notes in payment, without notice of the trust; but who did not discharge his judgment or execution, or prove that he relinquished any lien or security in the transaction.

Where such a trustee was entitled to a part of the securities for his own benefit, on the beneficiary tracing a portion less than his own to the hands of third persons, the trustee having nothing left in his hands; such third persons cannot assume that the portion in their possession was that belonging to the trustee. They stand in this respect in the same position towards the beneficiary, as the trustee himself. The holder of negotiable bills or notes received as security or indemnity, or as payment for a previous liability or indebtedness, without relinquishing any valid security or lien; is not protected against the true owner either in law or equity; although the same were taken in entire good faith.

The New York cases on this subject, commented upon.

October 11; 18, 1844.

THE case made by the pleadings and testimony was as follows.

On the 18th of May, 1839, S. Crowell being indebted to A. L. Jordan, gave to him two promissory notes for \$300 each, payable in six and twelve months, signed by E. S. Townsend as his surety. Soon after the notes were delivered, Crowell confessed a judgment to Townsend for \$3000 to secure his liability on this and other notes, amongst which was one of \$500 to the Wayne

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County Bank. An execution was issued on this judgment and Crowell's goods were sold under it. The sheriff received the purchaser's notes for the proceeds by Townsend's direction, and delivered them to the latter to the amount of \$2640 34. At this time Townsend was in embarrassed circumstances and owed a large debt to the Wayne County Bank. D. G. Ely was also a judgment creditor of his, and had an execution in the sheriff's hands.

On the 6th of July, 1839, Townsend negotiated a part of the notes received by him from the sheriff on the execution against Crowell, amounting to \$1062 62, to the bank, the bank discounted the same, and retained out of the avails their note against Crowell, and credited the residue to Townsend. On the 26th of August, 1839, he transferred another portion of the notes, nearly \$500, to Ely, as a payment on his judgment and execution.

Townsend paid nearly \$600 of the notes on liabilities of Crowell, and the residue, like the parcel turned out to Ely, he used for his own benefit, leaving the notes to Mr. Jordan unpaid. The bank by its cashier had notice of the origin and consideration of the notes. Ely received his portion without any information on that head.

On the 26th of December, 1839, Mr. Jordan transferred the two notes of Crowell and Townsend to Mr. Clark, who commenced this suit on the 7th of January, 1840. The Wayne County Bank, in the mean time had become insolvent, and had passed into the hands of a receiver. The bill was filed against Crowell, Townsend, Ely and the receiver, and claimed that the two latter should pay the complainant's notes against C. and T.

The answer of Ely set forth that his execution had been levied on sufficient property of Townsend to pay it, and that he received the notes in payment, and thereupon discharged his execution. These facts, however, were not proved.

The answers of Ely and the bank insisted on their right to retain the notes and their proceeds, as having been received in good faith, without notice, and for value.

A few additional facts are noticed in the judgment of the court.

A. L. Jordan, for the complainant.

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D. Craig, for Ely and the Receiver.

THE ASSISTANT VICE-CHANCELLOR.—The defendants objected to the reading of Townsend's testimony, unless the complainant waived a decree against him, and also because Townsend was primarily liable to the complainant's claim. As he permitted the bill to be taken as confessed, and thereby admits the demand, the objection is not well founded. (*Bradley v. Root*, 5 Paige's R. 632.)

When Townsend transferred the notes in controversy to the respective defendants, a portion of them equal to the amount of the complainant's notes against Crowell, belonged in equity to the payee of those notes, and to that extent Townsend was a trustee of the same for the payee of the notes.

As between himself and Townsend, the payee was not obliged to look to the latter's personal responsibility, but he had a right and interest in the notes themselves which a court of equity would protect and secure; and if necessary for his protection, this court would have restrained Townsend from transferring them, and placed them in the hands of a receiver to be applied to the payment of the notes.

The cases of *Bank of Auburn v. Throop*, 18 Johns. 505, *Haggerty v. Pittman*, 1 Paige's R. 298, and *Curtis v. Tyler*, 9 ibid. 432, are sufficient authorities for these positions.

The principal inquiry in the case therefore is, whether the defendants have obtained a title to the notes, which can be maintained against the prior equity of the complainant.

First. As to the Wayne County Bank. To the extent of the demand of the bank against Crowell for which Townsend was a surety, the right of the bank to take a part of the notes is undisputed. The residue of the notes which the bank received, was applied to the previous indebtedness of Townsend. No notes of Townsend's were paid by the operation, nor any securities relinquished. It does not appear in what form the demand against Townsend existed, but the net amount of the notes applied to it was passed to his credit on the books of the bank, from which I infer that the debt was for overdrafts or for money lent, and standing in an open account against him.

Thus, if the notes received had proved to be worthless, the bank would still retain its claim upon the original debt. It was said however, that the bank *discounted* the notes received. I do not perceive any peculiar force or virtue in that circumstance. It is precisely the same as if a merchant having a book account against Townsend, had received those notes to apply on it, and after calculating the discount for the time they had to run, and deducting the same from their nominal amount, had entered the net proceeds to the credit of Townsend in his account.

The bank having taken the notes for a precedent debt, without parting with any property or security, cannot retain them against the prior equity of the complainant.

I cannot act upon the suggestion that the defendants have obtained the portion of the securities which Townsend himself was entitled to keep, in respect of his own advances for Crowell. I must enforce the complainant's equity in the notes, precisely as it stood against Townsend, before the defendants received them; and he then had a right to pursue the notes which constituted the trust fund. So in regard to the complainant's exhausting all the other assets which remained in Townsend's possession, before calling upon the defendants; or proving that he had no available remedy against Townsend personally. It does not appear that any portion of the trust fund remained in Townsend's possession or control, which was of any value, or that a resort to him would have been of any avail.

In the authorities referred to, it was shown expressly, that the creditor had another fund or resource equally available to him, and therefore equity required him to resort to it in the first instance.

Second. The defendant Ely claims that he is a *bona fide* holder for a valuable consideration and without notice, of the notes which he received from Townsend, and is therefore entitled to retain them as against the complainant.

In order to determine this claim, it is necessary to ascertain what facts are proved in respect to Ely's receipt of the notes. He had recovered a judgment against Townsend upon a prior indebtedness, and an execution had been issued thereon against the property of the latter. In this stage of the affair, Ely re-

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ceived the notes from Townsend, in part payment and satisfaction of the judgment, and Ely directed his attorney to discharge the execution, and the judgment also. The answer states that the judgment and execution were discharged accordingly; but this is alleged upon the defendant's information, and not being proved, is to be laid out of the case.

So with the allegation in his answer, upon his information and belief, that his execution was levied upon the goods of Townsend more than sufficient in amount to satisfy it, and the goods were holden by the sheriff subject to the execution. This statement might be true, and yet by reason of prior executions on the same property, the levy may have been unavailing; but as it is not proved I need not criticise it.

The consideration upon which Ely became the holder of the notes constituting the trust fund, is therefore a precedent debt resting in judgment and execution. He received them in satisfaction, but he did not actually discharge either the judgment or execution.

This is not sufficient to enable Ely to retain the notes as against the complainant. Nor do the cases relied upon sustain his defence.

In *The Bank of Salina v. Babcock*, 21 Wend. 499, which is one of the strongest cases in his favor, the bank on receiving the misappropriated note, cancelled and discharged notes to nearly the same amount, on which they had responsible indorsers. They not only received the notes in payment, but parted with their security for the prior debt, on the faith of those notes. And in *Mohawk Bank v. Corey*, 1 Hill, 513, there was a similar consideration. *The Bank of Sandusky v. Scoville*, 24 Wend. 115, was decided upon our usury law of 1830, and is not directly in point. The learned judge who decided it, had only three years before, in *Smith v. Van Loan*, hereafter mentioned, distinctly sanctioned the decision made in *Rosa v. Brotherson*, 10 Wend. 85; and I cannot imagine that in his short opinion in the case of the Bank of Sandusky, he intended to assert a contrary doctrine.

It is not to be denied that one of the authorities cited by the defendant, upon this point, is in his favor.

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I refer to the *Bank of St. Albans v. Gilliland*, 23 Wend. 311; but that case is not law in this state.

In *Coddington v. Bay*, 20 Johns. 637, the Court for the Correction of Errors decided that the receipt of negotiable notes as security or indemnity for a previous liability, did not entitle the holder to retain them against the true owner, although they were taken in perfect good faith. The arguments urged in that case in favor of the holder of the notes, were as cogent as any that can be presented when the paper is received in payment of a debt already due from the person transferring it. And the reasoning of the judges who pronounced the reported opinions are equally applicable to the taking of notes in payment.

Accordingly in *Rosa v. Brotherson*, 10 Wend. 85, the Supreme Court decided that where a creditor received a negotiable note before its maturity, in good faith *in payment* of a precedent debt, he could not enforce it against the maker who had a defence to it while in the hands of the payee. This decision was approved in *Smith v. Van Loan*, 16 Wend. 659, where the facts of the case are more fully stated than they are in the report in 10th Wendell.

In *Payne v. Cutler*, 13 Wend. 605, the notes were received *in payment*, and the court permitted the maker to prove a failure of consideration against the holder, who had taken them without notice, before their maturity.

In the *Ontario Bank v. Worthington*, 12 Wend. 593, 600, the bill was discounted and applied to take up a protested note, and the same principle was upheld by the court.

In 9 Wend. 170, *Wardell v. Howell*, the note was received as security, but the court affirm the principle as applicable to taking it in payment, where no security is parted with.

Francia v. Joseph, 3 Edw. Ch. R. 182, was similar in all respects.

And in all these cases, the various judges who decided them, regarded *Coddington v. Bay*, as establishing the principle, that receiving negotiable paper for a pre-existing debt, either as security or as payment, is not of itself, receiving it in the usual course of trade for a valuable consideration.

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In *Smith v. Van Loan*, before cited, the question was one of set-off.

In the recent case of *Stalker v. McDonald*, in the Court for the Correction of Errors, December 26, 1843, and which is not yet reported,^(a) the principles established in *Coddington v. Bay*, were again discussed and were re-affirmed by that court with a solitary dissenting voice.

The Chancellor in his opinion says, that the cases to which I have referred "fully establish the principle, that to protect the holder of a negotiable security which has been improperly transferred to him in fraud of the prior legal or equitable rights of others, it is not sufficient that it has been received by him merely as a security, or nominally in payment, of a pre-existing debt, where he has parted with nothing of value, nor relinquished any security upon the faith of the paper thus improperly transferred to him without any fault on his part." And the Chancellor adds that there have been many other decisions to the same effect, made in the different courts of law and equity, since *Coddington v. Bay*, which have not been reported.

It thus appears that from 1822 to the present day, the only decision in our courts which conflicts with the law as settled by our highest judicial tribunal, is that of the *Bank of St. Albans v. Gilliland*; and that case can have no weight, when opposed to the whole current of authority, and especially to the principle established in the court of last resort.

Applying that principle to the facts before me, I cannot sustain Ely's defence. The payment of his judgment by the notes was nominal. For aught that appears, he might have enforced his pending execution, or issued another, on learning the complainant's equity. He parted with nothing of value, he relinquished no security on the faith of the notes in question.

His equity therefore is not equal to that of the complainant, and his legal title must yield to the prior and greater equity.

In my judgment the defendants Ely and the Wayne County

(a) It is now reported in 6 Hill, 93. And see *Ronan v. Adams*, 1 Smedes & Marsh. Ch. R. (Miss.) 45.

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Bank, stand upon the same footing, and must restore to the complainant the amount of his notes. And as between themselves, they should contribute in proportion to the amounts which Townsend improperly transferred to them.

There must be a decree accordingly.

**SUAREZ, Administrator, &c. v. THE MAYOR, ALDERMEN AND
COMMONALTY OF THE CITY OF NEW YORK.**

It is an universal principle of jurisprudence, at this day, in civilized countries, that the succession of personal or movable property, wherever situated, is governed exclusively by the law of the country where the decedent was domiciled at the time of his death.

A decree against the primary administrators of an intestate, in a suit relative to the succession of movable property, conducted in due form and between proper parties, at the place of his domicile in a foreign country; is conclusive upon a subsidiary administrator appointed here, in respect of the rights of the parties which were therein adjudicated.

This was held of a decree in the Superior Court of Justice for the District of Carthagena in the republic of New Grenada, establishing the right of a party as next of kin of an intestate; the question arising in a suit by such party to recover assets obtained by an administrator appointed here.

The same right also sustained upon proof of the laws of succession in New Grenada.

Where the principal administrator at an intestate's domicile, in a foreign country, allots to a party as his next of kin, diverse things in action existing here, and makes a transfer and delivery of the same so far as is practicable; such party is entitled to receive the things in action from the administrator here, in the absence of creditors claiming the fund.

On such an administration here, it appearing that the claimant would be entitled at the domicile of the intestate, to receive the entire fund, all other claimants having been ascertained and paid by the principal administrator there; the fund will be paid directly to such claimant, without remitting it to the intestate's domicile.

The statute exemption from the payment of interest on moneys paid into the treasury of the city of New York by the public administrator, was designed as a compensation for the important public duty of rescuing the effects of aliens and strangers, and preserving them for their creditors and relatives. And it was intended by the legislature that the corporation of the city should have the benefit of the use of the money until it should be claimed by the rightful owners.

The corporation does not stand upon the footing of private trustees, using the trust fund for their own profit or advantage, and is not liable to pay interest on those moneys, unless by reason of some wrongful act or omission.

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And before paying the fund to a foreign claimant, regard to the public duty as well as the pecuniary liability of the corporation, requires that his right should be very fully established.

The corporation is not put in default as to the payment of the fund in such a case, by a petition to the common council truly exhibiting a rightful claim, where no proof is presented with it. It is the claimant's duty to follow up his petition, and exhibit his proofs to the common council, or to the committees intrusted with its examination.

The common council is a legislative body, charged with interests and duties of great magnitude and importance; and its action in respect of claims, is necessarily more like that of a legislature, than like an individual's.

November 6; 22; 1844.

THE bill in this case was filed on the 10th day of February, 1841, by Leonardo S. Suarez, as administrator with the will annexed of Juana Mendez, of the city of Cadiz in the kingdom of Spain, to obtain payment of \$16,295 77, which had been deposited in the treasury of the city of New York by the public administrator, and which arose from the personal assets of Juan A. Brid.

The fund was claimed for Mrs. Mendez on the ground that she was the grandmother and sole next of kin of the decedent.

The principal facts will be found in the opinion of the court. The bill set forth a petition to the common council of the city in behalf of Mrs. Mendez, for payment of the fund in March, 1838, and a similar petition by Mr. Suarez as her administrator in December, 1840, and that in each instance the corporation neglected to make payment; and that there was no other claimant of the fund.

The answer stated that there had been no sufficient or legal proof made to the city authorities, of the right of Mrs. Mendez to receive the fund; which has always been ready for the true owner.

Testimony was taken by commissions, both in Cadiz and in Carthagená; and the cause was heard on pleadings and proofs.

C. B. Moore and *F. B. Cutting*, for the complainant.

J. Leveridge, (Counsel of the City) for the defendants.

THE ASSISTANT VICE-CHANCELLOR.—*Juan A. Brid* of Car-

thagena, in the then republic of Colombia, died there in 1832, leaving a large amount of personal assets deposited with the New York Life Insurance and Trust Company, in the city of New York. He also left a large estate at Carthagena, where he had been domiciled for thirty years prior to his death.

He died intestate, and left no relatives at that place, except two illegitimate children. He was a native of Cadiz in Spain and emigrated from thence to Carthagena.

The defendants acting through and by their public administrator, took out letters of administration on Brid's estate in the city of New York, pursuant to the provisions of the revised statutes, collected the assets which were in the hands of the Trust Company, and the amount after deducting the expenses of administration, was paid into the city treasury in January, 1836.

The complainant claims this amount as the legal representative of Mrs. Juana Mendez late of Cadiz; alleging that she was the grandmother of Juan A. Brid, and his next of kin under the laws regulating succession at the place of his domicil.

I. In support of the complainant's claim, he has proved by copies of the records of judicial proceedings in the courts at Carthagena, and by the testimony of witnesses examined there upon commission, the following case.

Administration of the estate of Brid was granted by the competent tribunal at Carthagena, to Pablo de Alcazar and Nicolas del Castillo of that city. They entered upon their duties and conducted the administration there until the death of Castillo in 1834, after which Alcazar alone executed the trust.

Some time prior to 1839, a suit was brought in the Inferior Court of First Instance at Carthagena, to settle the conflicting claims to the estate of Brid. The parties in the suit, were the two minor natural children by their mother as their representative, Pedro Macia as the attorney in fact for Juana Mendez, one Argumedo as the attorney in fact, of the tutor or guardian of Andrea Brid a minor, who was a niece of the intestate; and the Attorney General in behalf of the State of New Grenada, (in which state Carthagena was situated, upon the division of Colombia.) By the decree of the court, one-fifth of the estate was

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declared to belong to the two natural children, one-fifth to Andrea Brid, and three-fifths to the state, as confiscated by reason of the alienage of Juana Mendez.

Macia the attorney for Mrs. Mendez, appealed from this decree to the Superior Court of Justice for the District of Carthage, which on the 28th of June, 1839, reversed the decree of the Inferior Court as to the four-fifths of the estate awarded by that tribunal to Andrea Brid and the state of New Grenada.

The decree of the Superior Court declares that the natural children are entitled to one-fifth of the hereditary property of Brid, there being no legitimate descendants; and that the legitimate ascendants are called to the succession, where there are no legitimate descendants; and are preferred to all the collaterals, to the exclusion of the latter. That it is proved legally and beyond doubt that Juana Mendez was the legitimate grandmother of Brid; and the decree then declares that all the property left by Brid, within the republic as well as out of it, belonged to Juana Mendez his legitimate grandmother, and by her death to whomsoever represented her rights, with the deduction of one-fifth part of the hereditary property which belonged to the two natural children.

On the 15th day of January, 1840, Alcazar, the surviving administrator of Brid, in pursuance of that decree, attended before the second Judge of the Court of First Instance, with Macia who acted under a power as the attorney in fact of the executors of Mrs. Mendez, to carry into effect the decree and an order of the court made January 9th, 1840, by delivering to Macia, three duplicate certificates of the original deposit made in the Trust Company. This act or proceeding recites that the original certificates of which these are duplicates rested with a mercantile house in New York to which Alcazar had delivered them, and that the amount of the certificates at that day rested in the treasury of the city of New York; and it describes each certificate accurately and in detail. The act then shows that the judge delivered the three duplicate certificates to Macia as the attorney in fact of the executors of Juana Mendez, and Macia took them into his actual possession. The act of delivery was signed by the judge and by

Alcazar, Macia, and an agent in behalf of the mother and representative of the two children of Brid.

In addition to this, it is proved that Mrs. Mendez died at Cadiz on the 28th day of April, 1837, leaving a will, and that Pedro Macia was authorized by her executors to act in their behalf at Carthagena.

It is an universal principle of jurisprudence at this day, in civilized countries, that the succession of personal or movable property, wherever situated, is governed exclusively by the law of the country where the decedent was domiciled at the time of his death. (Story's Conf. of Laws, 403, 404, § 480 to 482 *a*; 2 Kent's Comm. 428 to 430, 2d ed.; *Schultz v. Pulver*, 3 Paige's R. 182, per Walworth, Chancellor; S. C. 11 Wend. 363, per Nelson, Justice.)

The estate of Brid which is in question here, was therefore distributable according to the laws which were in force at Carthagena when he died.

The decree in the suit relative to the succession, carried on at the place of his domicil, against the primary administrators of his estate, appears to have been conducted in due form, and between proper parties. It not only settled the right of Juana Mendez to four-fifths of Brid's estate, but in execution of the decree, the identical fund in the defendants hands was awarded to her representatives, and symbolically delivered to them by the court.

This decree and act of delivery, are in my opinion, conclusive upon the subsidiary administrators appointed here upon the estate of Brid, and entitle the complainant as the legal representative of Mrs. Mendez, to receive the fund collected by the public administrator.

II. The complainant fortifies by other testimony, the case thus made by the judicial proceedings at Carthagena.

It is satisfactorily proved that Brid left no legitimate descendants or relatives at that place. And omitting entirely the testimony of the executor and legatees of Mrs. Mendez who were examined at Cadiz, the other witnesses examined there sufficiently prove that she was the grandmother of Brid, and his only surviving relative in the ascending line.

Witnesses learned in the law testified in the cause at Car-

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thagena, and prove that the old Spanish laws of succession were and still are in force in Colombia and New Grenada. The notaries examined to this point concur with the decree of the court which I have already stated, that the laws of Spain, De Partidas, L. 4, Tit. 13, Part. 6, and as found in L. 1 and 2, Title 20, Book 10 of the "Novisima Recopilacion de la Leyes de España," contain the law of succession as applicable to this case. And the extracts given, as well as the oral testimony of the witnesses, prove that the law governing the distribution of Brid's estate was correctly applied and declared in that decree of the Superior Court of Justice. These extracts correspond also with the rules for succession *ab intestato*, laid down in the Institutes of the civil law of Spain, by Doctors D. Ignatius Jordan De Asso Y Del Rio, and D. Miguel De Manuel Y Rodriguez, Book 2, Title 4, § 2. (6 Ed. Madrid, 1805.)

III. Irrespective of the judicial proceedings establishing the right of the representatives of Mrs. Mendez to the fund in question, it is made out by the evidence in the case.

Thus it is shown that Brid was domiciled at Carthagena. He died there leaving no legitimate descendant, nor any legitimate ascendant surviving except Mrs. Mendez. He left natural children. By the law of his domicil, Mrs. Mendez became entitled to four-fifths, and the two children to one-fifth, of his property. The administrators appointed by the proper tribunal at his domicil, administered his estate, delivered to the two children or their legal representative the one-fifth, and to the attorney of Mrs. Mendez's executors, four-fifths of such estate. The fund in question was a part of the latter four-fifths, and was actually transferred, so far as they could transfer it, to Juana Mendez, as Brid's next of kin.

All this appears to have been done in good faith on the part of the administrators of Brid, and with the sanction of a judge of the Court of First Instance at Carthagena.

The fund in the defendant's hands was thus allotted and delivered by the principal administration at the domicil of the intestate, and in the absence of creditors, became a part of the estate of Mrs. Mendez.

Aside from this actual distribution, it being proved that the

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natural children have received, at Carthagená, their share of the whole estate of Brid, and that Mrs. Mendez was entitled to the whole residue, I perceive no reason why it should not be paid to her representatives here, without transmitting it to Brid's domicil. Our statute contemplates such payments. (2 R. S. 125, § 35; and *ibid.* 127, 128, § 43. And see *Harvey v. Richards*, 1 Mason's R. 381, 408; *Daves v. Head*, 3 Pick. 128; *Jennison v. Hapgood*, 10 Pick. 77.)

Upon these various grounds, the complainant is unquestionably entitled to receive the fund from the defendants.

IV. The complainant claims interest on the amount, from the commencement of this suit.

He alleges that he tendered to the defendants abundant *prima facie* evidence of his right before instituting the suit; that they unreasonably and wrongfully neglected to examine and allow his claim, thereby compelling this litigation; and that they have mixed the fund with their own and used it for their corporate purposes.

The Public Administrator is an officer of the corporation of the city of New York, and the corporation is responsible for his acts.

The legislature has provided that this municipal corporation shall act as the conservator of the effects of strangers who die within their city or port, or who die abroad, leaving effects here, and where no relative or executor appears, to administer such effects.

The public administrator is the accredited officer by whom the active duties of administration are to be performed; and when his accounts are adjusted, the fund belonging to each estate, passes into the city treasury, pursuant to the statute.

The statute also provides that the corporation shall be answerable for all moneys paid into the city treasury by the public administrator, *but not for any interest on such moneys*; and that all persons who shall be entitled to receive such moneys as creditors, legatees or relatives of the deceased, shall have the same remedies against the corporation therefor, as they would have against any executor. (2 R. S. 127, 128, § 43.)

The law is perfectly explicit that the corporation shall not be answerable for interest; and it is manifest that the legislature

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designed this exemption as a compensation for their undertaking the important public duty of rescuing the effects of aliens and strangers from the rapacity of the persons who surround them at their decease, and preserving such effects unimpaired for their creditors and relatives. The provision for commissions is intended for those expenses of administration which are incurred before the net proceeds of the respective estates are paid into the treasury. I am satisfied also that it was expected and intended that the corporation should have the benefit of the use of the money. Otherwise it would have been left to stand to the joint credit of the city comptroller and the public administrator, where the statute requires all large sums to be placed while the administration is in progress. But the surplus when ascertained, is to go into the city treasury, and of course to be mingled with the city funds and used and drawn upon with them. The city, as a great municipal corporation, was deemed sufficiently responsible to meet the demands from this source from time to time as they should arise. And as the direction to pay the money into their treasury, implied that it would be subject to their temporary use; so the positive enactment that they shall account for it without interest, appears to me to be a clear indication that they might make such use of it as they could, as a compensation for its safe keeping and proper distribution when called for.

This view of the case precludes any claim for interest on the mere ground that the corporation made use of the money, (and whether they did or not, I have not examined;) or for any period anterior to the decree, unless some wrongful act or omission of the common council has subjected the city to the payment of interest.

The complainant's proof upon this point is, that his attorney presented a petition in his name to the common council in December, 1840, which set forth the state of the fund, that Mrs. Mendez was entitled to it as the heir of Brid, and that Mr. Suarez had been appointed her administrator here. It offered to verify the claim and prayed for payment of the money. The petition was presented in the Board of Aldermen, and referred to the Committee on Laws. The attorney of Mr. Suarez and his law partner, testify that they received no notification to at-

tend and verify the claim, and the latter says he was prepared and in readiness to present the requisite proofs to the committee on receiving such notice.

It does not appear that any action was had by the committee, or any further efforts made by the complainant's agents to induce action upon the petition.

I do not think that the defendants have been put in default by these proceedings. The sum was large, and the claim made to it, (by the grandmother of the decedent residing in Spain, and he having lived and died in South America,) was very unusual. The defendants were acting more as public officers of the government, than as mere trustees. Moreover if they had paid out the fund on a fictitious or erroneous claim, they would not have been discharged from liability. Their public duty, as well as their corporate liability, required that the claim should be very fully established.

It is said that the corporation, by the acts of the common council, declined to hear the proofs offered, or to give an opportunity for their presentation.

I think this is an erroneous view of the case. The proofs might have been presented with the petition. Such is the usual course on presenting claims to legislative bodies, according to my understanding; and the common council of this city is a legislative body, charged with interests and duties far exceeding in magnitude and importance those of most of our state legislatures. Again, after presenting the petition without the proofs, the complainant should have watched its reference, and attended upon the Committee on Laws in order to produce his proofs or to have a time appointed for that purpose. It is not reasonable to hold that the committee should have waited upon him, or that unasked, they should have fixed a time and given to him notice to attend.

It is observable also, that the case finally made by the complainant, is not fully stated in his petition. He recovers in this suit, either by force of the judicial proceedings at Carthagena, or by proof that Mrs. Mendez is entitled to four-fifths of Brid's estate as his grandmother, and that those entitled to the other fifth part

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have received it in full at Carthagen. The claim made by the petition, is simply as the sole heir of Brid's whole estate.

Without resting upon this diversity, I am convinced that it would be unjust to hold that the corporation is in default for not paying the money to the complainant upon the petition of his attorney.

For the reasons already mentioned, I do not consider that the defendants stand upon the footing of private trustees who are not allowed to make any profit or advantage from the use of the trust funds; and the adjudged cases relative to the allowance of interest against such trustees, are inapplicable.

The claim for interest must be disallowed.

V. Both parties insist upon being paid the costs of the suit.

There is no principle upon which I can charge the defendants with costs. They were acting in a public capacity, and could not pay over the money with safety or propriety, until the right to it was clearly established. And having regard to the large amount of the fund, and the remote relationship of the claimant, it would not have been asking too much on their part, if they had required a decree for their indemnity, after having been presented with the proofs which were in the complainant's possession in December, 1840.

In *Glen v. Fisher*, 6 J. C. R. 35, to which I was referred, a devisee unreasonably resisted the payment of a legacy charged upon the land devised to him. It is not analogous to this case.

On the other hand, the defendants were fully apprised of the particulars of the right set up by the complainant, when they were served with a copy of his bill of complaint early in 1841; and so far as it appears before me, they resisted the claim without examining into the proofs by which it was then supported. Besides, they have had, or might have had, the use of the fund in the meantime.

There must be a decree for the payment of the fund to the complainant, without costs to either party.

**THE NEW YORK LIFE INSURANCE AND TRUST COMPANY v.
HOWARD and others.**

Where a creditor of N. holds as his security, for a specific debt, a mortgage of N. against H., which by an agreement between themselves, N. is bound to discharge; and N. makes a payment to his creditor on the specific debt; such payment enures to the benefit of H. in respect of the mortgage, and the creditor cannot retain H.'s mortgage by subsequently making an application of the payment on other debts due to him from N.

By force of the agreement, the payment made by N. operates as a discharge of so much of H.'s mortgage.

N. absconded, and the creditor obtained some security from him, though far less than his other debts. H. is not entitled to participate in the benefit of such security to reduce his mortgage.

November 18; 27; 1844.

THIS was a bill to foreclose a mortgage executed by Howard and wife to Edward A. Nicoll, on the 1st of September, 1836, for \$7883 34, and by him assigned to the complainants on the 28th of November, 1837.

The answer of Howard and wife set up as a defence, that Nicoll in January, 1840, entered into a sealed agreement with Howard, by which N. was to pay off the mortgage, and Howard was to convey the mortgaged premises to Nicoll. On their part, Howard and wife executed and delivered in escrow, a deed pursuant to the contract. The answer also stated a payment of \$3000 by Nicoll to the complainants on this mortgage; and that he made to them a general assignment of his property which produced enough to pay them the whole amount of Howard's mortgage.

A decree was made referring it to a master to compute the amount due to the complainants on the mortgage; on which reference Howard proved that Nicoll assigned this, and another mortgage of Howard's amounting to \$7000, to the complainants, as security for a loan by them made to Nicoll for \$14,883 34; he executing to them his bond therefor. That on the 7th of February, 1839, the company assigned the mortgage of \$7000 to Mr. Le Roy, and in the assignment acknowledged the receipt of

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that sum. And that in June, 1840, Nicoll made a payment of \$3000 to the complainants on his bond.

The defendants then proposed to prove the agreement of January, 1840, and their conveyance in escrow, in order to show that they ought to be credited for the payment of \$3000. The master rejected this evidence, and reported the whole amount of the mortgage to be due. The defendants excepted to his report. There was another exception which it is not deemed necessary to mention.

It appeared that Nicoll absconded in December, 1842, after abstracting from the complainants, whose secretary he had been for many years, more than \$300,000. And besides his defalcations, he had been their debtor to a large amount for a considerable time before that event. And it was contended that in the absence of notice of Howard's contract, the complainants had a right to keep and apply the whole mortgage debt on their demands against Nicoll.

W. Betts, for the complainants.

J. T. Duryee and *Geo. Wood*, for Howard and wife.

THE ASSISTANT VICE-CHANCELLOR.—The two bonds and mortgages of Howard, after they were assigned to the complainants, were a valid security in their hands for the payment of Nicoll's bond of \$14,883 34.

On the 7th of February, 1839, the company assigned the bonds and mortgage for \$7000, to Le Roy. The assignment acknowledged the receipt of the sum of \$7000 as the consideration for the transfer. It is said that this was a fraudulent proceeding on the part of Nicoll, and that the company never received any part of that consideration. There is, however, no proof of this; and as the case stands before me, the company transferred the mortgage and received the \$7000.

This discharged the same amount of Nicoll's bond, which after that event remained outstanding for \$7883 34, and was secured by Howard's remaining bond and mortgage.

In January, 1840, (assuming for the purpose of the argument,

the truth of the statement which the defendants offered to prove before the master,) Nicoll entered into a sealed agreement with Howard by which he was to receive conveyances of the mortgaged premises, and restore both bonds and mortgages to Howard. At the same time the conveyances were executed by Howard and his wife, and deposited in escrow, to be delivered to Nicoll on his fulfilment of the contract.

In June, 1840, Nicoll paid to the company \$3000 on account of his bond.

The defendants insist that this sum should be credited on Howard's bond and mortgage for \$7883 34.

Nicoll was bound to pay the whole as between him and Howard. When the \$3000 was paid, the company, so far as the testimony discloses, had no right to apply it on any demand against Nicoll, save his bond. On payment of the balance of his bond, Nicoll could have required the company to transfer to him Howard's bond and mortgage, and on obtaining the same his agreement required him to deliver them up to Howard.

In another way of stating it, after the payment of the \$3000, the company's interest in Howard's bond and mortgage was reduced to \$4883 34, being the balance of Nicoll's bond.

As between the company and Nicoll, he then became the equitable owner of \$3000, in Howard's bond and mortgage.

And as between Nicoll and Howard, that amount became at once cancelled and paid, by force of the agreement made in January preceding.

Such being the equities of the respective parties in June, 1840, no subsequent demands of the company against Nicoll can alter, or impair the right which Howard then acquired.

The \$3000 was therefore an equitable payment upon the bond and mortgage in question, and the testimony relative to the agreement between Nicoll and Howard should have been admitted.

It further appears that when Nicoll absconded in December, 1842, he was very largely indebted to the company; that he made an assignment of property for their indemnity; and that they have realized about \$10,000 from that source, and expect to receive about \$5000 more; the whole being less than one-twentieth part of their demand. The defendants insist that the com-

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pany are bound to apply the sum received, to the extinguishment of the balance of Nicoll's bond of \$14,883 34, and thereby discharge Howard's mortgage.

There is surely no ground for this claim. Both parties are creditors of Nicoll. The company have obtained an inconsiderable security for a part of their general debt. The defendants have obtained none. On what principle of equity or justice can I deprive the company of the benefit of their indemnity, and give it to the defendants. By endeavoring to secure the residue of their debt, they did not relinquish the security which they already had in the defendants mortgage.

If they had obtained complete indemnity for all of their demands against Nicoll, and there were no others standing in the same situation with Howard who might be injured thereby, Howard would undoubtedly be entitled to the benefit of the indemnity, either by direct application upon his debt or by subrogation.

As the case is, he has no such right.

CAMMEYER and others v. THE CORPORATION OF THE UNITED GERMAN LUTHERAN CHURCHES IN THE CITY OF NEW YORK and GEORGE TIEMANN.

A right as a corporator in a religious society, is obtained by stated attendance on divine worship therein, and contributing to its support by renting a pew, or by some other mode usual in the congregation.

Such a right cannot be derived by descent from the founders of the society, or from the former contributors to, or worshippers in the same.

The association between a religious incorporation and its corporators, is voluntary on the part of the latter; and is dissolved by their withdrawing from attendance on its worship, omitting to contribute to its support, and uniting in the establishment of another like incorporation.

Two Lutheran churches or religious societies, each owning temporalities, though of unequal value, entered into an agreement for a union, to remain forever as one body, congregation or society, by a new name expressing such union; and by which their estates were to be consolidated for the common use and benefit, and

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the charge of their estates and concerns was intrusted to officers to be chosen out of the united congregation ; with other provisions showing an entire union and consolidation into one body ; and the agreement also provided that out of the property, the ancient church of one of the constituent societies should be rebuilt on the site where its ruins stood, for the use of the united congregation as soon as circumstances would admit.

The united body was immediately afterwards incorporated by the name agreed upon, and after twenty years, the corporation sold the site of the ancient church, and never rebuilt it.

In a suit brought by persons claiming to be corporators in the united church, and to be in part the representatives of the ancient congregation which owned such site, to compel the corporation to build and endow a church in pursuance of the terms of the union :

- Held*, 1. That all the property of the two churches became vested in the incorporation.
2. That the management and control of the same vested in the *trustees* as a distinct body, and to the exclusion of the elders and deacons.
 3. That the same vested in the corporation as an individual body or unit, in trust for the maintenance of the faith, doctrines and discipline of the Evangelical Lutheran Church ; and not for the benefit of the two former congregations connected together for certain purposes. The existence of both was merged in the union.
 4. No member of either of the former churches had any greater, better or different right in the incorporated society, than the members of the other. The rights of all were equal and upon a common footing. And if the ancient site of the one had been built upon, the rights of the members of both in such edifice would have been equal in all respects.
 5. That the agreement for the union did not constitute a trust or a covenant, for the rebuilding of such edifice on the ancient site, or elsewhere. It was merely an expressed intention, which the corporation and subsequent corporators might execute or waive, in their discretion.
 6. If there had been a trust, the court from the lapse of time and the circumstances, would presume that the sale of the site and other appropriation of the fund, were by the direction and with the consent of those interested.

The *trustees* of an incorporated religious society can alone bind the corporation. The action of the *vestry* has no such force. And where the act relied upon was adopted at a meeting of the conference or council, which consisted of the minister, elders, deacons and trustees, convened in mass ; the corporation was not bound, although a majority of the trustees were present.

Where the exercise of corporate acts is vested in a select body, an act done by the persons composing that body, in a mass meeting of all the corporators, or in union or amalgamated with other like bodies, parts of the corporation, is not a valid corporate act.

B. having purchased a church edifice at a public sale, in his own behalf, conveyed it to an incorporated Lutheran Church, (which had another place of worship,) for a consideration equal to three-fourths of its value, on certain express conditions, of which one was that divine service therein should be in the English language. After a trial by the grantees in the maintenance of such service, which did not

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prosper, B. released them from all the conditions, except the one requiring it to be used as a Lutheran Church. *Held,*

1. That on the execution of the deed there were no *cestuis que trust* in existence or in expectancy; but that it created a charitable use, the fund for which flowed from B. and the corporation, as donors, and the latter were the almoners of the charity.
2. That persons coming to worship in the edifice, acquired no rights, beyond the period for which they rented pews from time to time.
3. That the conditions in the deed were vested in B. alone, and his release was competent to extinguish them.
4. That joint contributors to a charity, vesting the fund in one of their number, may revoke the charity or alter its terms and conditions.

An offer to sell land at a fixed price, without more, is an offer to sell for cash.

The acceptance of such an offer, to bind the seller, must be simple, and without the addition of any new terms or qualifications.

Since the revised statutes, contracts for the sale of lands resting upon mutual promises, must be subscribed by both the buyer and the seller, to be obligatory upon the latter.

Aliens may be corporators and trustees in a religious corporation.

It is a fatal objection to a suit that a part of the complainants do not show any title to participate with the others, in the relief sought.

September 17, 18, 19, 20, 21; December 5, 1844.

THE bill in this cause was filed on the 18th day of April, 1840, by Augustus F. Cammeyer, Henry Otten, John F. Reinicke, John F. Thall, Henry Storms, Burnet Otten, Henry Budelman, Carsten Platt, Andrew Prosch, Harman Schilling, Henry Dusterkotter, Peter Aims, Benjamin Ogden, Andrew Surre, Adolph F. Ockershausen, Philip W. Engs, John F. Gardner, Roger Williams, William Johnson, and Christian Smack, against The Corporation of the United German Lutheran Churches in the City of New York, and George Tiemann; the latter being made a defendant as the president of the board of trustees of the corporation.

The bill and answer were very voluminous, and there was a great mass of documentary and other evidence, on which with the pleadings, the cause was brought to a hearing.

The principal important facts are fully stated in the opinion of the court. Some others, with the documents on which the chief stress was laid by the complainants, will be inserted here.

One of the latter was denominated the *Union Bond*; and was in these words:

"Articles of agreement, indented, made and concluded upon this sixth day of January, in the year of our Lord one thousand seven hundred and eighty-four, between the elders and deacons of the ancient German Lutheran Church in the city of New York, called Trinity Church, by and with the free consent and approbation of the congregation of the said church called Trinity Church, of the one part, and the elders and deacons of the German Lutheran Church in the said city of New York, called Christ Church, by and with the free consent and approbation of the congregation of the said church, called Christ Church, of the other part, witnesseth as follows, to wit:—First, that the said two respective congregations, being fully persuaded that it will promote their common interest and the cause of religion, to unite and become one body, congregation or society, have, therefore, united together, and by these presents do inseparably unite together, to be and remain forever hereafter, one body, congregation or society, to be known and distinguished by the name of the congregation of the United German Lutheran churches in the city of New York, and that in all contracts, sales, purchases, suits, controversies, and other transactions, respecting the said united congregations, their property, business or affairs, the style and title of the said united congregation shall be, "The ministers, elders and deacons of the United German Lutheran Churches in the city of New York," and that rulers, elders and deacons, and all other church officers who shall be intrusted with the care, charge, management and direction of the estate, interest and concerns of the said united congregation, shall be chosen in manner as theretofore hath been accustomed, but that such rulers, elders, deacons, and church officers, shall always be chosen by and out of the said united body, congregation, or society.

"Secondly, That all the estates, whether freehold, leasehold or personal, and all other of the effects and property, at this time belonging to either of the aforesaid churches, are, by these presents, consolidated into one common fund, for the use and benefit of the said united congregation, out of which fund all expenses attending the said united congregation shall be paid, and thereout the ancient Lutheran Trinity Church (where the ruins

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now stand) shall be built for the use of the said united congregation, as soon as time and circumstances will admit.

“Thirdly, That the respective treasurers, and others who are accountable, shall as soon as it can be done with conveniency, render to the trustees to be appointed for the said united congregation, just and true accounts of all estates, effects, moneys and securities, belonging or appertaining to the said respective churches, and of all debts due or owing to or from the same churches, and of all deeds, writings, vouchers, books and evidences relating thereto separately, and shall deliver up all such estates, effects, moneys, securities, deeds, writings, vouchers, books and evidences, to the trustees of the said united congregation, to be kept in their charge for the use and benefit of the said united congregation.

“Fourthly, That regular books shall at all times hereafter be kept by the trustee or trustees of the said united congregation (for the time being) wherein shall be entered and set down an account of all moneys by him or them received, paid, laid out, and necessarily expended, and of all transactions, matters and things whatsoever, which may require the same. And that all persons whom it may concern, shall, at all seasonable times, have free access to inspect and look over the books so to be kept as aforesaid.

“Fifthly, That a meeting of the vestry, or of the said united congregation, shall be called so often as the business of the said congregation shall require. And that all officers necessary to serve the said united congregation shall from time to time be chosen out of and by a majority of the said united congregation, and such officers' salary (if any) to be in like manner stipulated and settled.

“Lastly, That only one minister shall be called for the service of the said united congregation, until there shall appear a sufficient income properly to support two or more ministers.

“In testimony whereof, we, John Baltus Dash, Frederick Reger, Diederich Heyer, Jacob Resler, the elders, Henry Arcularius, and Henry Bisher, deacons, of the said ancient Lutheran Trinity Church, and Philip Oswald and Alexander Fink, the elders, Henry Simmermans, Christian Shultz, and Anwick Earnish,

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deacons of the said Christ Church, on the part and behalf of ourselves and the congregation of the said united churches, have hereunto set our hands and seals, the day and year first above written.

JOHN BALTUS DASH, [L. S.]	FREDERICK ^{His} mark REGER, [L. S.]
DIEDRICH HEYER, [L. S.]	JACOB RESLER, [L. S.]
HENRY ARCULARIUS, [L. S.]	HENRY ^{His} mark BISHOP, [L. S.]
PHILIP OSWALD, [L. S.]	ALEXANDER FINK, [L. S.]
HENRY SIMMERMAN, [L. S.]	CHRISTIAN SHULTZ, [L. S.]
ANWICK EARNISH, [L. S.]	

"Sealed and delived in presence of
JAMES LINTILETTE,
GIRARDUS HARDENBROOK."

In pursuance of this bond of union, the united churches in July, 1784, became incorporated by virtue of the act passed April 6th, in the same year, under the name of "The Corporation of the United German Lutheran Churches in the City of New York." And they continued from that time, to the era of this controversy, to worship as one congregation, using the German language, in the building known as Christ Church, and which had before the union, been occupied by the Christ Church branch of the United Churches.

On the second of February, 1802, two resolutions were adopted by the trustees of the corporation of the United Churches, in the words following, viz.

"Resolved, (on motion of Mr. Caman, seconded by Mr. Coester,) that it is the unanimous opinion of this board, that it is necessary for the benefit of this congregation that every Sunday afternoon, English service should be performed in Christ Church.

"Resolved, that if the vestry agrees to the wish of the trustees, the trustees will provide a generous recompense to Mr. Philip Meyer and Henry Muhlenberg to perform that service."

On the 15th of May, 1802, a petition, signed by two hundred and five members of the congregation, praying for the introduction of English preaching on Sunday afternoons in Christ

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Church, was presented to a meeting of the vestry, (which vestry then consisted of the ministers, elders and deacons of the church,) and the vestry thereupon passed resolutions of which the following are a copy.

"1st. That it satisfactorily appeared, from the above signatures, that if the church council should introduce English preaching in the afternoon, it would be with the desire and consent of the congregation.

"2d. But a suspicion existed among many members, that after a while the service in the German language would be abolished. Therefore it is ordered that the German service in the afternoon shall only be so long discontinued till another opportunity shall present to rebuild our Trinity Church, or to provide in some other way for English service.

"3d. That before the alteration itself takes place, it will be necessary to give the pastor a new ratification of the salary promised him by the congregation, without the addition of any clause or proviso, the congregation not having made any at his election, and with the remark that the minister shall be entitled to the same, notwithstanding any alteration which shall be made with the advice and consent of the church council, in the divine service which this board advises the trustees to do.

"4th. That before the alteration in regard to the resolution of the trustees, of the first of February, one thousand eight hundred and two, take place, wherein they declare that if the church council agrees with the wish of the trustees, the trustees will grant a reasonable recompense to the Messrs. Meyer and Henry Muhlenberg.

"5th. That, however, the vestry will keep the further intention in a lively remembrance both what concerns the choice of a suitable assistant to our minister in the German and English languages, as also the establishing in the forenoon and afternoon service both in the German and English, by building up the church in Broadway, agreeably to the union bond.

"6th. That it shall, however, be fixed and determined, that so long as there are members in the congregation who hear and desire the German service, the German service shall be considered the principal divine service in the congregation.

"7th. That the minister herewith has the consent of the vestry to permit English preaching in the afternoon as soon as he shall have received the ratification mentioned in resolution 3d, relating to his call."

These resolutions of the vestry were presented to the trustees, who, on the 25th day of May, 1802, adopted the following :

"Whereas the salary allowed to our present minister, Rev. John C. Kunze, consists of a free dwelling-house, eight cords of fire wood, and three hundred pounds current money of the State of New York, that is to say, seven hundred and fifty dollars, as stipulated in the call, and one hundred pounds like money, that is to say, two hundred and fifty dollars, having been added thereto, by the congregation, at a meeting of the same, which meeting was held agreeably to the charter of this corporation, for the express purpose, on the eleventh day of August, one thousand seven hundred and ninety-four. Which two aforementioned sums making together one thousand dollars, to be paid to him, the said Rev. John C. Kunze, annually, in four equal quarterly payments, viz., the one, on or about the first day of June, the other, on or about the first day of September, the next, on or about the first day of December, and the other, on or about the first day of March, in every year.

"And whereas the abovementioned salary to the said Rev. John C. Kunze is on his performing certain duties and services specified in his call, and as some alteration having been made, or to be made hereafter in the respective duties and services of the said Rev. John C. Kunze by the particular request and desire of the majority of our congregation, and by and with the consent and approbation of the vestry thereof, for the purpose of introducing the English language in part into our church service :

"Therefore, we, the trustees of the United German Lutheran Churches in the city of New York, in order to remove all doubts concerning the right and title of the said Rev. John C. Kunze to the abovementioned salary, do hereby declare and confirm to the said Rev. John C. Kunze the aforesaid salary, any alteration made or to be made in performing service in the English language in our church notwithstanding.

"On motion, unanimously resolved : That the seal of the cor-

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poration be affixed to the above declaration, and that the chairman do sign the same."

In 1821, some members of the congregation of the United Churches, who were desirous of establishing worship in English, held a meeting and appointed a committee to concert measures for establishing an Evangelical Lutheran Church in connection with the United Churches in which service should be performed in the English language.

On the 16th of January, 1821, this committee made a report to a conference of the ministers, elders, trustees and deacons of the United Churches, strongly recommending the measure, and advising the raising of funds by subscription in aid of the object; and submitting a series of resolutions, which were adopted by the conference in these words, viz.:

"I. *Resolved*, That it is expedient to take measures to establish an English Lutheran Church in this city, in connection with the present Lutheran Church.

"II. *Resolved*, That a committee be appointed to obtain information on the following subjects, without expense to the board:

1. The situation of suitable lots for a church.
2. The most favorable conditions on which they can be leased or purchased.
3. The plan of a new church.
4. The probable expense.
5. The amount that would be subscribed by the members, and by other persons friendly to the undertaking; and,
6. Such other information as may be requisite to facilitate the attainment of our object.

"III. *Resolved*, That the said committee shall have power to associate with themselves such members and friends of the congregation as shall be ready to assist the committee in the prompt discharge of their duties.

"IV. *Resolved*, That the following articles shall be considered as the conditions on which subscriptions for a new church shall be received, and as the basis of a permanent connection between the old church and the contemplated church:—

"Article I. The money which shall be collected by the committee shall be placed in the Savings Bank of the city of New

York, until it shall amount to a sum that may be deemed sufficient to justify the erection of a new church.

"Article II. Should it appear, after a reasonable time, say one year or more, that a sufficient sum cannot be obtained by contribution, the deposited sums, together with the interest that shall have accrued thereon in the aforesaid Savings Bank, shall be refunded to the respective donors, their heirs or assigns.

"Article III. Should the undertaking succeed, the present church council or vestry shall be enlarged, and an equal number of trustees, elders, and deacons, elected by each church, shall form one church council, and shall superintend the concerns of both churches.

"Article IV. All the annual expenses of the new church shall be paid out of the income of said church, and shall in no wise encroach on the personal and real estate of Christ Church.

"Article V. The two cemeteries or burial places, shall be held in common by both churches, subject to the regulations now existing.

"Article VI. As soon as requisite, the congregation shall call an additional pastor, who shall assist the present pastor, so that they shall alternately officiate in both churches, and in the German and English languages.

"Article VII. Divine service in the German language exclusively, shall be performed twice on every Lord's day, and once or oftener on festival days, in Christ Church, at the corner of Frankfort and William streets.

"Article VIII. Divine service in the English language exclusively, shall be performed three times in every Lord's day, and twice or oftener on festival days, and as often in the week as advisable, in the contemplated church.

F. C. SCHAEFFER, *President of the Conference.*

W. WHILMERDING, *President of the Trustees.*

PETER SCHMIDT, *Secretary.*

New York, January 16th, 1821."

A subscription was commenced, and after a considerable amount was subscribed, at another conference meeting held on the 5th day of July, 1821, it was determined that the United

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Churches as a corporation and society, should not take part in the raising of funds or in the erection of the proposed new church, and resolutions were adopted, in these words :

"Whereas, the committee appointed on the sixteenth of January last, in compliance with the second resolution, having reported progress, and stating that circumstances had arisen which made it necessary that the subscribers to the contemplated English Lutheran Church should themselves decide as to the disposition of the subscribed and deposited money: therefore, *Resolved*, That the said committee be discharged from any further consideration of the subject, and that the treasurer be authorized to hold the deposited sums to the order of the subscribers in their collective capacity.—*Resolved*, That the articles in the fourth resolution, be still considered as the basis of a permanent connection between the old church and the contemplated church."

The parties interested in the English church scheme thereupon proceeded to build a new church in Walker-street in the usual mode of voluntary contributions, and by means of credit, at an expense of thirty thousand dollars and upwards. It was called St. Matthew's Church. After the building was completed, efforts were made to connect it with the United Churches, and to have it form a part of that corporation and congregation; which efforts were steadily resisted by the latter corporation.

On the 20th of July, 1824, the church council of St. Matthew's filed a bill in equity against the corporation of the United Churches, setting up the Union bond of 1784, and the proceedings in 1821 upon which their enterprise was commenced, and claiming the benefit of the bond and a performance of the resolutions adopted by the conference in January, 1821.

On the 28th of February, 1825, by agreement of the parties thereto, the equity suit was abandoned and dismissed; and on the fourth of April following, the congregation of St. Matthew's Church became incorporated under the statute by the name of "The Evangelical Lutheran Church of St. Matthew's in the City of New York."

This corporation was deeply involved in debt at its outset, and it soon became necessary to sell its real estate. Accordingly, in the fall of 1826, on its application to the Chancellor, an order

was made authorizing the corporation to sell its church edifice and lots, with the organ and other movable property. Under this order the same were sold at auction, to Benjamin Birdsall, for \$22,750; and were conveyed to him by the corporation of St. Matthew's, absolutely and without reserve, on the 12th day of December, 1826.

On the 15th day of the same month, Birdsall conveyed the same to the corporation of the United Churches, receiving therefore the price paid by him. The property was intrinsically worth at that time, about \$30,000.

The deed from Birdsall to the defendants contained certain conditions, which were as follows :

"First, that the said St. Matthew's Church shall be used and occupied by the said parties of the second part, for a Lutheran Church, in which divine service shall be performed exclusively in the English tongue, except that on particular occasions, and for peculiar solemnities, in cases of necessity, service may also be celebrated in the German tongue.

"Secondly. And further, that in case at any time hereafter it should be deemed expedient or proper by the said parties of the second part, their successors or assigns, to sell and dispose of the said church and premises, then, in that case, they, the said parties of the second part, their successors or assigns, shall put, or cause to be put up, in front of said church, and shall also publish in three of the daily newspapers printed in the city of New York (such notice to be continued for three weeks successively) a notice of their intention to sell and dispose of the same. And shall also in such notice offer the said church to such Germans, or descendants of Germans, (or members,) who may then be members of, or pew-holders in said church, at the sum of twenty-two thousand seven hundred and fifty dollars, which sum the said church now costs them, the said parties of the second part, together with all moneys that shall have been laid out in improvements thereon; they the said purchasers binding themselves, their successors and assigns, to use and occupy the same as a Lutheran Church, in which divine service shall be performed in the English language. But should this offer not be complied with, and the consideration money paid, within four

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weeks after the first notice shall be so given as aforesaid, in such case a certificate shall be obtained from either the mayor, recorder, or first judge of the city of New York, that such notice has been given as is required in this condition, and that it has not been complied with ; which certificate shall be conclusive proof of its contents, and in such case, this second condition shall be null and void ; and the said parties of the second part, their successors and assigns, shall be at liberty to sell and convey the said land and church free and clear from any restriction or condition whatever, excepting the seventh and eighth conditions.

“Thirdly. The trustees, elders, and deacons, of the said United German Lutheran Churches, together with their minister, and the minister of the said St. Matthew’s Church, to be appointed as is hereinafter provided, shall make such rules, bye-laws, and regulations, for the government of said St. Matthew’s Church, as to them shall seem meet, and the same at pleasure may revoke or alter.

“Fourthly. The trustees and the vestry and congregation of the said United German Lutheran Churches shall call a pastor or minister for the said St. Matthew’s Church, and appoint all officers, and fix all salaries therein. Provided, however, that after the death or resignation of the first pastor, so to be appointed as aforesaid, the male members or pew-holders of said St. Matthew’s Church shall have the right to recommend a pastor for the said St. Matthew’s Church by voting for the same by ballot, and shall and may present their recommendation to the said trustees and vestry of the United German Lutheran Churches, who shall be bound to appoint the person so recommended, or to reject him. And the said trustees and vestry shall thereupon appoint such other person to perform divine service in the English tongue, as aforesaid, as to them shall seem fit and expedient, in the place of the person originally recommended.

“Fifthly. The said St. Matthew’s Church shall be governed by, and its officers shall act under, the immediate direction of such bye-laws, rules and regulations, as may from time to time be made, as is hereinbefore prescribed.

“Sixthly. No moneys to be expended, or debt or debts contracted, on account of St. Matthew’s Church, unless directed or

authorized by the trustees of the said United German Lutheran Churches.

"Seventhly. The rear gate in the iron railing on Cortlandt alley, shall be closed, and kept closed, permanently.

"Eighthly. In the basement story of St. Matthew's Church no other school shall be kept than a young ladies' school, or a school not more noisy and troublesome to the neighborhood than a young ladies' school. *Provided, nevertheless*, that none of the aforesaid conditions shall apply to, or affect in any way, or interfere with such conveyances of the aforesaid premises, by way of mortgage, as the said party of the second part, their successors or assigns, may deem it necessary from time to time to make and execute in the place of those mortgages now subsisting thereon, or that may be executed thereon, and not exceeding in amount the principal sum of sixteen thousand dollars. But it is expressly understood and covenanted, by and between the parties to these presents, that in case of a sale of the said premises under any mortgage, the surplus money over and above the payment of the incumbrances thereon, and after reimbursing the parties of the second part their expenditures therefor and thereon, without interest, shall be paid to the mayor and recorder of the city of New York, by them to be put out on interest, secured in the best manner, for the purpose of being applied to building or purchasing a new establishment for the English Lutheran Congregation."

The minister and most of the congregation of St. Matthew's, organized a new church called St. James, and became incorporated by that name on the 20th of February, 1827.

The corporation of the United Churches, instituted a service in English, in the edifice bought of Birdsall, and continued it for several years; employing a minister for that purpose, and letting the pews to such as chose to attend. Their own proper service was continued at Christ Church, as before. Some of those who had belonged to St. Matthew's congregation attached themselves to this English congregation kept up by the United Churches.

The experiment of the English service was not successful, and the United Churches determined to abandon it. They thereupon on the 2d day of April, 1830, obtained from Birdsall and

his wife, a conveyance or indenture releasing and discharging them from all the conditions contained in Birdsall's deed to them before recited, except the seventh condition. The indenture however restricted the grantees from using or employing the premises forever, for any other purpose or use than as a Lutheran Church.

The United Churches then concluded to sell their place of worship known as Christ Church, and to have divine service performed in St. Matthew's. To give the English service a further trial, they limited their own to the forenoon, and permitted the English congregation to occupy the edifice in the afternoon, and stipulated not to discontinue the latter, without giving a year's notice to the English church council.

That arrangement was carried into effect. The United Churches let the pews for both their own and the English service, and paid the minister who performed the latter.

The English congregation continued to decrease, and in 1839, had become very small, while the defendants' congregation, worshipping in German, rapidly increased. Early in that year, the defendants resolved to discontinue the English service, and gave due notice of their intention to the English congregation, on the 4th of February, 1839; and in April, resolved that the same take effect on the first of May, 1840.

This led to a protest and remonstrance on the part of the English congregation, and a variety of negotiations, resolutions and proposals, which need not be set forth at large.

On the 25th of April, 1839, the trustees, and also the congregation of the United Churches, resolved to offer St. Matthew's church for sale at \$22,750 to such Germans or descendants of Germans, of the English congregation, as might be members or pew-holders in the church; the purchasers to bind themselves to use and occupy it as a Lutheran Church for divine worship in the English tongue.

On the 25th of December, 1839, the trustees put up in front of the church and published and continued for three weeks, in three daily newspapers, a notice to that effect, inviting written applications, and specifying that they would meet at the vestry room on the 3d, 10th, 17th, 24th, and 31st days of January.

They also published with it, an order of the recorder of the city attached thereto, approving the notice and offer, and declaring that if not complied with, he should give to the defendants such a certificate as was described in the second condition of Birdsall's deed.

Several attempts were made to purchase of the defendants under this notice.

The complainant, Cammeyer, on the 6th January, 1840, served on them a written notice, agreeing to take the church at the price and for the use proposed, adding, "terms of payment to be agreed upon." Next was a notice on the 17th of January, signed by Mr. Cammeyer as "purchaser," and Messrs. Birdsall, Otten, Reinicke, Aims, Ogden and Surre, as "committee," describing themselves as a committee of such Germans as the offer designated. This notice ratified Cammeyer's offer, and agreed to purchase on the terms of the defendants, provided a good and available title could be given.

On the 29th of January, another notice was delivered signed by Messrs. Cammeyer, Otten, Reinicke and Birdsall, referring to their former agreement, and stating their readiness to pay the price on receiving a deed approved by their counsel, Mr. Anthon, adding that the deed must be made to such persons in trust for the congregation, as counsel on both sides might deem it discreet; and offering in the mean time, to execute any contract to bind the congregation of St. Matthew's, which might be deemed prudent, and might be approved by their counsel.

On the 31st of January, 1840, at a meeting of the elders, deacons and trustees of the United Churches, it was resolved, and the board of trustees resolved, that all offers made by their corporation for the sale of St. Matthew's Church, were at an end and determined. A copy of the resolution was delivered to the persons who had offered to purchase.

The bill in this cause was thereupon filed, and an injunction obtained restraining the defendants from interfering with the maintenance of the English service in St. Matthew's Church as it was then conducted. This injunction continued till the hearing of the cause. The Rev. Mr. Geissenhainer, the minister employed by the defendants for that service, in 1827, resigned his

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charge in February, 1840. Upon this, the congregation of St. James joined the English congregation of St. Matthew, and bringing with them their minister, worshipped in St. Matthew's during the pendency of the suit.

The bill prayed that the corporation of the United Churches might be decreed, by reason of the alienage of many of the trustees and members, to be incompetent to hold the legal title of St. Matthew's Church ; or that it might be decreed to hold it in trust for the complainants and those represented by them, or for the descendants of the founders of the original churches ; and for an account of the property of Trinity Church and its accumulations, and of the contributions made for the erection of St. Matthews, and that both of those funds might be decreed applicable to the payment of the purchase money of St. Matthew's Church ; or that the corporation might be decreed to carry into effect the contract of sale of St. Matthew's Church and premises, made with the complainants or some of them, by the notice, offers and acceptances, before stated and which occurred in January, 1840 ; or for a specific performance of the Union bond, and all and singular the resolutions and articles stated in the bill ; and for general relief.

The answer, amongst other things, set up by way of demurrer, that the bill was multifarious, and that there was a misjoinder of the complainants ; also the want of equity, and want of parties.

Henry M. Western and John Anthon, for the complainants.

Edward Sandford and Charles O'Connor, for the defendants.

THE ASSISTANT VICE-CHANCELLOR.—In order to understand the cause of the controversy between these parties, and the grounds of the claim made by the complainants, it is necessary to trace the history of the defendants' church, from its origin in this city.

There were a few Lutherans among the first emigrants from Holland to this province, and there is no doubt but that they were driven from Holland by the persecution of the Arminians,

and those holding kindred tenets, which had been denounced by the Synod of Dort in 1618, 1619.

They were relieved from persecution here, but were not permitted to worship together in public, until after the province became a British colony. At that era, they had become so numerous, that they sent to Germany for a pastor, and one arrived here in 1669. About the year 1671, they erected a log church at the south-west corner of Broadway and Rector-street, which was known as Trinity Church. The ground on which it stood was granted to them by the government, in 1674. Sometime between 1725 and 1740, this edifice was taken down and a substantial stone building erected in its stead. Besides the contributions of the members in New York, aid for this object was obtained from other denominations here, and from Lutherans in London, Amsterdam, Hamburg, and in other parts of Europe.

There is no question but that, until after the year 1700, and to near the period of re-building Trinity Church, the service of the church was exclusively in the *Low Dutch or Holland language*.

In 1710 and 1711, a large body of German Protestants, principally Lutherans, driven from the Palatinate by the intolerance and persecution of the Elector and the Roman Catholic clergy, found their way to the colonies of New York and Pennsylvania. Emigration from Germany has steadily continued from that time to the present, with but trifling interruptions; whilst the influx of Hollanders substantially ceased in the seventeenth century. In consequence of these various causes, the German portion of the congregation of Trinity Church became so numerous, that about the time of their rebuilding the church edifice, it was necessary to have service occasionally in German, and it was had accordingly every second or third Sunday.

This did not prove satisfactory to all the German members, and prior to 1750, a large body of them detached themselves from the Trinity congregation, and established a separate church known as Christ Church, in which the service was in the German language exclusively, until after the revolution.

Dr. Henry M. Muhlenberg, in his reports to the mission establishment at Halle, gives but a sorry account of the spirit and temper of these seceders. It seems that they endeavored to ob-

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tain half of the property of Trinity Church, as Dr. M. says, "in order to be able to appoint any vagrant as their preacher." They failed to obtain any aid from that quarter.

Nevertheless they persevered, and in process of time, bought a site, and erected a substantial stone church, at the corner of Frankfort and William-streets, which was afterwards known as Christ, or Swamp Church. After Christ Church was established, the congregation of Trinity consisted in part of the Low Dutch and their descendants, and in part of Germans. Mr. Muhlenberg officiated for them at intervals, his regular charge being in Pennsylvania. On a Sunday in September, 1750, he preached for them for the first time. The service was in German in the morning, and in English in the afternoon. He states as a reason for preaching in English, that he was not sufficiently conversant with the Low Dutch. The congregation in attendance, he says, was small. In May, 1751, he was with them again, and on the 19th preached both morning and afternoon in German. On the 26th of May, he preached English in the morning, and Low Dutch in the afternoon.

The German portion of the church complaining that they could not understand those languages, the Church Council, on the 28th May, decided that there should be delivered on every Sunday one Low Dutch and one German sermon.

In July and August, he preached in English on Sunday evenings; and he pursued the same course in the summer months in 1752, which was the last of his ministration here, so far as we know from his reports to Halle. The English preaching drew a large crowd to the church, but the congregation was not large. In 1751, he relates that about fifty partook of the sacrament of the Lord's Supper, and in 1752, about forty.

These reports show that both of the Lutheran churches were at that period in a feeble condition. Trinity Church was unable to support a minister, except he devoted a fourth of his time elsewhere. They could pay him for preaching three Sundays out of four. Their church was called the Low Dutch Lutheran Church, while Christ Church was exclusively a German, or High Dutch Church.

In 1752, the latter made overtures for a re-union, which were

rejected by Trinity Church, because of the debt incurred for the building where the Germans worshipped.

A proposition made the same year, that Trinity Church should have service in Low Dutch and English only, so that their German members might be induced to go over to Christ Church, was also rejected by the Church Council of Trinity.

There is but little testimony in relation to the two churches from this period until the peace of 1783. The evening preaching in English was kept up a part of the intervening time, as appears by the testimony of the aged witness, Ressler. Trinity Church was burnt during the revolution; and at the close of the war, both churches were destitute of a pastor. From Dr. Kunze's report to Halle, it seems that before the British evacuated the city of New York, he had been invited by both congregations to visit and advise them. He came from Philadelphia for that purpose, brought the two Church Councils together, and succeeded in uniting them in January, 1784. At this time, Christ Church was still in debt, and Trinity had a considerable property. Dr. Kunze became their pastor, and preached to them in the edifice erected by Christ Church.

The union was effected by an instrument in writing, signed by the elders and deacons of both churches, and which will be more fully stated hereafter. The two congregations and their temporalities having thus been united together into one church, became incorporated in July, 1784, as one church, under the act of April 6, 1784, by the corporate name used by the defendants in this suit.

For this history, prior to the union of the churches in 1784, I am principally indebted to the Reports to the Orphan House at Halle, (*Hallische Nachrichten*,) and to Dr. Schmucker's Retrospect of Lutheranism in the United States.

After the union of the churches in 1784, the two became completely amalgamated into a single congregation, which continued its worship in Christ Church until after the origin of the present controversy. Dr. Kunze was their pastor from 1784 until his death in 1807, and preached uniformly in the German language; although he confirmed occasionally in English.

In 1794, the Rev. Mr. Strebeck who taught the school attached

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to the church, commenced preaching in English at the request of a part of the congregation, and continued it on Sunday afternoons and evenings for about two years, but without any regular call as minister. After he left, there was occasional preaching in English at intervals, by persons not employed by the trustees, until 1802.

In May, 1802, a petition for the introduction of English preaching on Sunday afternoons, signed by 205 members of the congregation, was presented to the vestry of the church, consisting of the minister, elders and deacons. The trustees had in February before, by resolutions, expressed their opinion in favor of having English service in the afternoon, and offered to provide a generous recompense to two young students of divinity then under Dr. Kunze's care, if the vestry would agree to have them perform that service. The vestry, on receiving the petition, passed certain resolutions, which in substance declared, that on the trustees ratifying anew the salary and contract of Dr. Kunze, he might permit English preaching in the afternoon; that a suspicion existed among many members, that on this being done, the service in German would, after awhile, be abolished; that, therefore, they ordered that the discontinuance of German in the afternoon should only last until another opportunity to rebuild Trinity Church, or to provide in some other way for English service; and that it should be fixed and determined, *that so long as there are members in the congregation who desire the German service, such service should be deemed the principal divine service in the congregation.* They also resolved to keep the further intention in lively remembrance, of establishing both the German and English services by building up the church in Broadway, agreeably to the union bond.

On the 25th May, 1802, the trustees ratified Dr. Kunze's call with the modified duty remaining in the new state of things; and the two students, Messrs. Philip Meyer and Henry A. Muhlenberg, were employed to perform English service on Sunday afternoons. It does not appear how long this service was continued, but it was not many years; for prior to the last war, most of the congregation, who desired to have English preaching left the old church, and established a new one called Zion Church,

where English service alone was performed by the Rev. Mr. Strebeck; and on this event, the English service in the old church was discontinued.

In 1805, the corporation of the United Church, with the assent of the entire congregation, sold the site of Trinity Church to the Episcopalians.

Not long after the death of Dr. Kunze, Mr. Schaeffer became the pastor of the United Churches.

It was agreed by the counsel, that Zion Church was burned down in 1814, within a few years after it was founded, and the congregation was broken up. Probably a part of it came back to the United Church. At all events, in 1821, the English party in the latter had again become numerous, and they set on foot a new project to build a church for English service, in connection with the United Church. A committee, appointed by that part of the congregation, made a report to a conference meeting, consisting of the trustees and vestry of the United Church, setting forth the inducements to the undertaking, and proposing a subscription and experiment to ascertain whether a new church could be built without involving the property of the existing church, and that the two churches should be superintended by one board or church council. The committee appended to their report a series of resolutions, which, with the report, were adopted by the conference meeting. The resolutions approve the undertaking; direct a committee to be raised to obtain information as to the site, plan, cost, and subscriptions, for the new church; and provide certain articles as the basis of a permanent union. Those articles prescribe a deposit of the moneys raised in the Savings Bank, and that they shall be refunded to the subscribers, unless in a year or more sufficient was obtained by contribution, to justify the erection of the new church; that if the project succeeded, the annual expenses of the new church should be defrayed out of its own income, and should in no wise encroach on the estate of Christ Church; and that divine service in German exclusively should be performed in Christ Church, and in English exclusively in the contemplated church.

These proceedings were had on the 16th day of January, 1821. Subscriptions were made for the new church to a considerable

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amount, and some moneys paid to the treasurer of the United Church, but without the trustees' sanction. In this stage of the affair, another conference meeting of that church was had on the 5th day of July, 1821, and a resolution adopted, stating that the committee appointed under their resolution in January, had reported that circumstances had arisen which made it necessary that the subscribers to the contemplated English Lutheran Church, should themselves decide as to the disposition of the money subscribed and deposited; and thereupon resolving that the committee be discharged, and that the treasurer be authorized to hold the deposited sums to the order of the subscribers collectively. They also resolved that the articles of the fourth resolution of January 16, 1821, be still considered as the basis of a permanent agreement.

The trustees of the corporation did not act as a separate body, on either of these occasions.

The subscribers to the new church proceeded, elected a provisional council, which included in its number the minister of Christ Church, Mr. Schaeffer, and several of the members of the Conference of the United Church, purchased the ground in Walker-street, and erected the church edifice thereon, which is the subject matter of this suit. The new church was called St. Matthew's, and divine service was first performed in it on the 22d of December, 1822.

In 1824, the new church attempted to carry out the union of government expressed in the resolutions and articles adopted by the United Church in January, 1821, and gave notice to the latter of the time and place of an election to be held for their proportion of the officers. They held such election, and notified the defendants of the result, and requested a joint meeting of the church council. The defendants declined to meet with them, stating that their board was full, according to the charter and church ordinances.

The congregation of St. Matthew's was deeply involved in debt by the erection of their church, and applied to the corporation of the United Church for a union of the temporalities of the two churches. This was also declined. The St. Matthew's people then filed a bill in equity against the defendants,

alleging that the latter were bound to aid them and unite with them in their enterprise, as well by the proceedings of the Conference meeting in January, 1821, as by the bond of union in 1784, and asking a decree accordingly. This bill was filed August 30th, 1824, and amongst the complainants I find Gen. Storms, and two others who are complainants in this suit. The equity suit in 1824 was defended by the United Churches.

On the 25th of February, 1825, the provisional Church Council of St. Matthew's, resolved to withdraw their bill and the claims therein set forth against the United Churches. The bill was accordingly dismissed by consent, on the 28th of February, 1825.

On the 4th of April, 1825, St. Matthew's Church became incorporated under the statute. Messrs. Storms, Surre, and Smack, of the present complainants, were in the first board of trustees of St. Matthew's.

The Rev. Mr. Schaeffer had become their pastor on the church being finished in 1822, and the service was conducted in the English language.

Mr. Geissenhainer, senior, succeeded him in the pastoral charge of Christ Church, and conducted the service there in German.

St. Matthew's Church was soon overwhelmed with its great debt, and on the 10th day of November, 1826, the church and lots in Walker-street were sold at auction to Benjamin Birdsall, for \$22,750, and the sale was ratified by an order of the Court of Chancery. Mr. Birdsall was a member of St. Matthew's Church, but he bought the property on his own account and responsibility, and received an absolute conveyance thereof. On the 15th of December, 1826, he sold it to the corporation of the United Churches, at the price for which he purchased it. Their deed from Birdsall contained certain conditions for the maintenance of English worship, and for the pre-emption of the church to an English Lutheran congregation in case of a sale; which will be more fully examined hereafter.

After the sale of the church was directed by the trustees of St. Matthew's, Mr. Schaeffer resigned his pastoral charge.

Soon after the sale, it appears that he had organized another English Lutheran Church, which was incorporated by the name

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of *St. James*, on the 21st day of February, 1827. Mr. Storms was one of the signers of the certificate of the election of the officers of the new corporation, and two of the now complainants, Messrs. Storms and B. Ogden, were elected trustees. Mr. Hoxie, a witness for the complainants, proves that the congregation of *St. Matthew's*, constituted the new church of *St. James*; and *St. Matthew's*, as a distinct church and corporation, ceased to exist. The church of *St. James* worshipped at the new Jerusalem Chapel in Pearl-street, and subsequently in Orange-street.

In the mean time, the defendants had taken possession of the *St. Matthew's Church* property, and called the Rev. Mr. Geissenhainer, junior, the son of their minister, to preach in that church in the English tongue. The call was during good behavior, and so long as they should be able to keep *St. Matthew's* without injury to the maintenance of their worship in the German language. On the 30th of March, 1827, the defendants, in conjunction with their two ministers, established by-laws and regulations relative to the congregation and worship in *St. Matthew's*, pursuant to one of the provisoes in Birdsall's deed.

Thus matters continued for about three years, when the defendants determined that their effort to keep up English worship in *St. Matthew's* had proved unsuccessful, and resolved to abandon the attempt. During the three years, it had cost the defendants \$5000, to maintain that service in *St. Matthew's*, beyond all the income derived from the church. About half of this deficiency was covered by contributions made for the purpose of enabling them to try the experiment. *St. Matthew's Church* contained one hundred and sixty-three pews suitable to be rented to stated hearers, of which not more than forty were rented by members of the English congregation. And at the same time, the defendants' old edifice, *Christ Church*, had become insufficient for the use of their own congregation.

Under these circumstances, on the 2d of April, 1830, they induced Mr. Birdsall to release to them all the conditions contained in his conveyance of *St. Matthew's Church*, (except the seventh, relative to the use of an alley;) and substituted the simple condition that it should be always used as a Lutheran Church. They then resolved to sell *Christ Church*, and they removed their own

congregation to St. Matthew's where they have worshipped ever since. They still kept up the English service in the afternoon, Mr. Geissenhainer, Jr., continuing the pastor of the English congregation; and they agreed with the English church council, to give them a year's notice of any alteration in the arrangement for such worship.

The defendants always rented the pews of the church from this time, both for the German and the English services, and collected the rents, and they paid the salaries of both pastors until 1840. Early in 1839, the defendants concluded to discontinue the English service. They show that their German congregation had become very large, and contained nearly three hundred paying members. On the other hand, the English congregation had diminished since 1830, and the number who paid pew rents, in the spring of 1840, was only eight.

In February, 1839, the trustees of the defendants, by resolutions, notified the English congregation of their purpose, proposed to aid them in obtaining another place of worship, and suggested to them to re-unite with the congregation of St. James's Church.

The English congregation protested against the discontinuance of their worship in St. Matthew's, and claimed the benefit of the conditions in Birdsall's deed. Mr. Geissenhainer, Jr. also protested, setting forth his rights under his call as the pastor of that congregation.

Committees of conference from the defendants' board of trustees, and from the vestry of the English congregation, met; and a committee from the vestry of St. James's, met with the latter; and finally all three committees convened together. The committees from St. James's and from the English congregation of St. Matthew's, proposed to the defendants, that the latter should build a new church for themselves, and that the St. James's Church should unite with the English congregation of St. Matthew's. The defendants declined the proposal, and nothing was effected by the conferences.

On the 24th of April, 1839, the congregation of the United Churches, adopted certain resolutions, which were also adopted by the trustees on the ensuing day, and then communicated to the English congregation of St. Matthew's. By those resolutions

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they rescinded those of February, 1839, and declared that they could not keep St. Matthew's Church as their property, without injury to the maintenance of their worship in German; that they would not permit the English congregation to use the church after May 1st, 1840, and would not after that day, maintain the English service there; that St. Matthew's be offered for sale to the English congregation, for the cost price of \$22,750;— and that a suitable site be procured and an enlarged church be erected for the use of the German congregation.

In December, 1839, the defendants published an advertisement in the newspapers, offering St. Matthew's Church at the price of \$22,750, to be used as an English Lutheran church.

In January, 1840, sundry members of the English congregation of St. Matthew's, (and several of the complainants were among them,) together with some members of St. James's Church, made various offers to accept of the defendants proposal, and to purchase the church. These offers were not responded to by the defendants, and at the expiration of the time limited in the advertisement, they declared that their proposal to sell was at an end and determined.

These transactions will be treated of more at large, in discussing the complainants claim to a specific performance.

On the 28th of January, 1840, the defendants settled with Mr. Geissenhainer, Jr., and his call as pastor was determined. He, however, preached for the English party until January, 1843. On the 2d of February, 1840, the vestry of the English congregation of St. Matthew, and the board of trustees, elders and deacons of St. James's, met together in St. Matthew's, and resolved to maintain their rights to the latter church.

Immediately after Mr. Geissenhainer retired, the congregation of St. James's, with their pastor, Mr. Martin, came into St. Matthew's Church, and uniting with the English congregation, have worshipped there on Sunday afternoons ever since, and have sold their Orange-street church.

This accession was not satisfactory to some of the latter congregation, who called another pastor, Mr. Mealy, and their Sunday school refused to unite with that of St. James's. The pastor of St. James's continued to officiate, and Mr. Mealy never

entered upon the duty of pastor. The bill in this cause was filed in April, 1840.

The various grounds urged by the complainants, and the relief sought both in the bill and by their counsel at the hearing, will appear in the progress of the decision.

The bill is exhibited by twenty persons, who allege in the outset that they are pew-holders and members, or late pew-holders or members of St. Matthew's Church; and they insist that they are the *true and only corporators* of the United German Lutheran Churches, and as such, entitled to all the muniments, benefits, and advantages of the corporation. They also allege that many of them are lineal descendants of the original worshippers, founders, and contributors to the Lutheran churches and estate, called the Trinity and Christ Churches.

Their claim as the *only corporators* of the United Churches, is equivalent to saying that those who were trustees and members of the vestry of that corporation when the bill was filed, were not corporators, nor entitled even to a vote in that church. This allegation is the more surprising, because a brief consideration will show that not a single individual of the twenty complainants, was then a corporator in the United German Lutheran Churches.

Their counsel stated that the eleven complainants first named in the bill were the vestry of the English congregation of St. Matthew's; and the other nine were members of the vestry of the incorporated church of St. James.

So far as the evidence shows, the great majority of the complainants never were members of, or attached to, the United Lutheran Churches. None of them have been members of that church, or worshipped in it, since St. Matthew's Church was erected. Previous to that time, Mr. Storms, and perhaps one or two more of the complainants, worshipped in Christ Church, and were then corporators of the United Churches. Their right as such corporators was derived, not from their descent from either Germans or Hollanders, but from their stated attendance upon divine worship in that church, and contributing to its support, by renting a pew, or other usual mode, in the congregation.

They may have attached themselves to the new church of St.

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Matthew's, with the expectation that it was to be a scion of the old Christ Church, and subject to the same government. But when they proceeded to incorporate St. Matthew's, and organized it as a distinct and independent congregation, they entirely relinquished such expectation, if it were ever entertained.

After the United Churches became the owner of St. Matthew's and maintained the English service there, the congregation who availed themselves of that service, were not members of the corporation of the old church, nor did they ever claim to vote at the election, or participate in the control of the affairs of the United Churches, either spiritual or temporal. Indeed, in the outset of the arrangement made after Birdsall's conveyance, all of the complainants who had been members of St. Matthew's appear to have abandoned it and joined in the establishment of St. James's. A few of them returned to the English congregation of St. Matthew, but at what time, is not disclosed by the testimony. After the United German Churches removed to St. Matthew's, there was no change in the rights of the two or three complainants last mentioned. They hired pews, but it was for the English service. They did not attend upon the service of the United Churches, or worship with them. They were no more corporators of the latter, than so many Presbyterians would have been, who were permitted to use the church edifice on Sunday afternoons. By the statute of 1784, no member was entitled to vote for trustees in this corporation, unless he was a stated attendant on divine worship in the church or congregation. The same provision in substance, is contained in the existing statute relating to Religious Incorporations. (1 Greenleaf's Laws, 75; 3 Rev. Stat. 2d ed. 209.)

Aside from the statute, the withdrawal of these complainants from Christ Church, in 1822 or 1823, was a severance of their connection with that corporation. The association was voluntary in the first instance, and was manifested by their attendance upon the public worship in the church, and contributing to its support. They had a right, at any time, to dissolve the association; and their leaving the church, and omitting to contribute, indicated that they had availed themselves of such right.

The law is so adjudged, in effect, in several of the states. In

the case of *Den on the demise of De Mott and others v. Bolton and others*, 7 Halsted's R. 206, 214, in the Supreme Court of New Jersey, each party claimed to be the lawful and sole trustees of the Reformed Dutch Church in the English Neighborhood, which was an incorporated church, attached to the Classis of Bergen, and the General Synod of the Reformed Dutch Church. In 1824, a part of the congregation, including the elders and deacons, who are by law the trustees, resolved to withdraw, and separate themselves from that Classis and Synod, alleging that the Classis and Synod had tolerated false doctrines, and passed unconstitutional orders. The church consistory unanimously resolved upon such separation, and attached themselves to the Classis, and ultimately to the Synod, of the *True Reformed Church*. The Classis of Bergen immediately suspended the minister, deposed the members of the consistory, and ordered a new election to be held for elders and deacons. The members of the church who adhered to the Bergen Classis, met accordingly, and elected a new set of elders and deacons. The court held that the latter were the legal trustees of the church, and entitled to its temporalities. The Chief Justice says that, "to constitute a member of any church, two points at least, are essential, without meaning to say that others are not so: a profession of its faith, and a submission to its government." "Simply holding the same faith, without submitting to the government and discipline of a church, cannot make, or keep a man a member of that church." "These persons, then, after they withdrew, did not continue members of the Reformed Dutch Church, simply because they held the same religious faith and tenets with the members of that ecclesiastical body." Mr. Justice Drake said: "The defendants obtained the right to office and the custody of the temporalities of a church, by connecting themselves with it, and by submitting to its government. If they have become tired of the church or its government, they certainly may exercise the right of withdrawing from it; but they cannot reasonably expect to carry off its offices and its property with them."

In *Curd v. Wallace*, 7 Dana's Kentucky Rep. 190, 196, which is stated more fully hereafter, the court said; "Without the statute of 1814, we should be of the opinion that the expelled and

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seceding members of that church, so long as they remain out of it, could not justly claim a right to any use of it, or control over it." In that case, some of the members of the Baptist Church became Reformers or Campbellites, seceded and organized a new society, and then claimed an equal use of the meeting house of the old church.

In *Baker v. Fales*, 16 Massachusetts Rep. 488; *a majority of the parish* in the first church in Dedham, called a minister who was not approved by *a majority of the members* of the church. The latter, with the defendant, one of the deacons, met and worshipped with some of the parish, at another house. They kept up the christian ordinances and public worship, and claimed to be the first church; but they did not afterwards attend public worship in the meeting house. The majority of the parish continued to occupy the house with their minister as formerly. The church was not incorporated, and their property by the provincial act of 1754, rested in the deacons. It was held, that the members who remained, constituted the church in that parish, and retained the rights and property belonging thereto; and that the members of the church who withdrew from the parish ceased to be the first church in Dedham.

The same principle was declared by the court in two subsequent cases in Massachusetts; *Oakes v. Hill*, 10 Pick. 333, and *Keith v. Howard*, 24 *ibid.* 292; where the result was however, controlled by their peculiar statutes relative to territorial parishes.

In *The Inhabitants of Harrison v. The Inhabitants of Bridgeton*, 16 Mass. 16; on the division of the town of Bridgeton and erection of Harrison, the latter was to receive its proportion of the property and rights of the old town. Bridgeton had a fund for the support of the ministry. The court held that this fund belonged to it as a *parish*, and no part of it went to the new town of Harrison.

The same decision substantially was made in the case of *Brown v. Porter*, 10 Mass. 93.

In the case of *Weckerly v. Geyer*, 11 Serg. & Rawle's R. 35, 39, Geyer brought a suit against the inspectors of an election, held in October, 1821, in the Lutheran Church of St. Michael and Zion, at Philadelphia, for refusing to permit him to vote.

He had been long a member, and held a pew there, and paid his rent, until after 1821, but he had not communed since 1788. In 1818, Geyer with ninety-six members of that church, had formed a society for instructing young Germans in the principles of the Lutheran Church, in the English language. They called a permanent minister, who was authorized to confirm and administer the sacrament; purchased a burial ground, and held their meetings for religious worship at the old academy in North Fourth-street. It was contended that Geyer and his associates had separated themselves from the original church, and had forfeited their right to vote at its elections. The Supreme Court of Pennsylvania decided, that these circumstances should have been submitted to the jury, upon the question whether Geyer had separated or not. Chief Justice Tilghman said he did not think that the formation of such a society, was *per se* a separation from the other congregation; that a man might separate himself from a religious congregation at his pleasure, and thereby cease to be a member of the corporation. And this separation might be manifested in various modes, independent of any proceeding by the church itself. See also, *Smith v. Smith*, 3 Desauss. Eq. Rep. 557, 582.

This disposes of the claim of the complainants, that they are corporators in the defendants' corporation.

In reference to the complainants being pew-holders in St. Matthew's Church, as alleged in their bill, it is not admitted, nor is there proof of it, except as made by the defendants. Their testimony shows that Messrs. Cammeyer, Storms, Otten and Prosch, were such pew-holders. The others do not appear to have rented pews there in the years 1839-40; and nine of them were avowedly members of St. James's Church, having no connection with St. Matthew's.

The allegation of their descent from the original founders, contributors and worshippers, in Christ and Trinity Churches, is no better sustained by the proof. The only attempt at proof, is in the case of Gen. Storms. As to him, it is shown that his wife is a grand-daughter of Jacob Ressler, a German who came here about the middle of the last century, and was an elder in Trinity Church in 1784. This does not reach to the foundation or endowment of either of the old churches; and I need not dwell on

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the utter groundlessness, in a legal point of view, of a claim founded upon Mrs. Storms descent from a corporator or member who never had any other or better right in the church property than Mr. Storms himself had before he withdrew from Christ Church.

I. The first prominent ground urged in behalf of the complainants, is under the terms of the agreement for the union of the churches in 1784, usually called the *Union bond*. They aver that the property of the churches was thereby vested in the United Churches, upon a trust to rebuild Trinity Church on the old site, and to maintain two ministers, of whom one should preach in English.

They further argue, that the bond, with the subsequent acts of the United Churches in regard to English preaching, establish a positive contract to endow a separate church for that object. It appears to me that there are many insuperable difficulties in the way of sustaining either of these positions.

1. What was the situation of the property of the two churches when the union took place?

They were both voluntary associations, and their property was held in trust by private individuals, for the purpose of sustaining the preaching of the gospel and the administration of the sacraments according to the faith, doctrine and discipline of the Evangelical Lutheran Church. It is probable that in the lapse of time, the legal title to the real estate of Trinity Church was no longer to be traced; but in whomsoever it was vested, it was upon that trust.

It is alleged, that in Trinity Church, the trust was to sustain English preaching at least one-third of the time.

In truth, if there were originally any trust as to *language*, in that church, it was unquestionably in favor of the Low Dutch. But when the contributions were raised for building the stone church of Trinity, (and those gifts were the chief endowments which it received from private donors,) it had already become a Low Dutch and German Church. We have every reason to believe that they were given for the church as it was.

The evidence is conclusive, that for half a century before the

union, those languages were the regular instruments of religious instruction in the church. During more than half of that period, it is true, there was a strong desire on the part of some, to have a part of the services in English; and there was, doubtless, an increasing necessity for it in respect of those children of the members who had been brought up in this country. I have stated all the evidence of the use of the English service, and it appears to have been inconsiderable, attended with embarrassment for the want of books, and looked upon with distrust and dislike by the main body of the church.

The resolution of the 28th of May, 1751, mentioned by Dr. Muhlenberg, requiring on every Sunday, one Low Dutch and one German sermon, is decisive, that the English preaching was an innovation which was not countenanced by the authorities, nor engrafted upon the regular administration of the church.

The language of the Union bond deserves consideration on this point. The one society is described as "the *ancient German* Lutheran Church in the city of New York, called Trinity Church," and the other as "the *German* Lutheran Church, called Christ Church." Thus both are described as *German* Lutheran Churches, and their future name was to be the *United German* Lutheran Churches. Their proper ecclesiastical cognomen was, "*Evangelical Lutheran* Churches;" and this use of the word "*German*" which was probably their common designation amongst their neighbors, strongly indicates the character of both churches at that time, in respect of language and nationality.

If the use of a particular language ever had any influence upon the trusts under which the property was held; by a long and uninterrupted usage, and the entire assent of those interested, the German language had become as much of the essence of the trust, as the language of Holland. But there was neither usage nor assent to the permanent use of the English tongue.

In reference to the force of the early usage, I will refer to the case of *Curd v. Wallace*, 7 Dana, 190, 195, where a meeting-house had been erected by voluntary contributions, and dedicated by the contributors, for "*the benefit of the Baptist society.*" A Baptist Church was shortly after organized, and took posses-

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sion of the house, and had for fourteen years used it as their house of public worship. A controversy having arisen between that society and a seceding branch of it, called the *Campbellites*, the Court of Appeals in Kentucky held that the old church or society which had been so long permitted to use and control the house and ground, without any complaint or question, had a right still to enjoy the use of it as beneficiaries of the trust estate.

The decision in that case turned upon what the court designated the anomalous and perplexing provisions of a statute of Kentucky.

In regard to the temporalities held by the Swamp Church, there is no question as to the trusts. The German language was that of its foundation, and no other had been used in its worship down to the era of the union.

The result is, therefore, that at that era, there was no trust attached to the property of either church which required preaching, or any portion of the service, to be performed in the English language.

2. I will next consider what was the influence of the union upon the trusts which were attached to this property.

The agreement for the union is made between the elders and deacons of Trinity Church of the one part, and the elders and deacons of Christ Church of the other part; each acting by and with the free consent and approbation of their respective congregations. It recites, that both congregations are fully persuaded that it will promote their common interest and the cause of religion, to unite and become one body, congregation, or society; and they have, therefore, united together, and thereby did inseparably unite together, to be and remain forever thereafter one body, congregation, or society, to be known as the congregation of the United German Lutheran Churches. They appointed the style and title by which their property, business and affairs were to be conducted. The charge, direction and management of their estates and concerns were intrusted to officers to be chosen by and out of the united body or congregation. All the estates, whether freehold, leasehold; or personal, and all other of the effects and property then belonging to either of the churches, were thereby consolidated into one common fund, for the use and benefit of

the united congregation; out of which all their expenses were to be paid, and thereout the ancient Trinity Church, where the ruins then stood, was to be built for the use of the united congregation, as soon as time and circumstances would admit. Only one minister was to be called for their service until there should appear a sufficient income to support two or more ministers.

There were various other stipulations and provisions relative to the consolidating of the property and its management; all of which are expressed to be of and for the united congregation, and for their use and benefit.

Within six months after the union, the congregation was incorporated by the name of "*The corporation of the United German Lutheran Churches in the city of New York.*" It is not questioned but that this act was done with the concurrence of the whole congregation, and Dr. Kunze refers to it in his reports to Halle, as being a subject of congratulation to the church.

The corporate name differed slightly from that adopted at the union. That it was the act of the same minds who effected the union, is apparent from the fact, that among the nine trustees first elected, were seven out of the ten elders and deacons who executed the articles of union; four of them having belonged to the Trinity vestry, and three to that of Christ Church.

Upon the united church becoming incorporated, all their united and consolidated property became vested in the corporation. 1 Greenl. Laws, 72, s. 4; *Baptist Church in Hartford v. Witherell*, 3 Paige's R. 296; *Potter v. Chapin*, 6 ibid. 639; *Trustees of South Baptist Church v. Yates*, 1 Hoff. Ch. R. 142; *The City of Cincinnati v. Lessee of White*, 6 Peters' U. S. Rep. 431. And see *Trustees of Watertown v. Cowen*, 4 Paige, 510.

One other effect of the incorporation was to give the management and control of the property to the *trustees* as a distinct and independent board in the church, and to the exclusion of the elders and deacons.

The effect of the union and the incorporation, was to vest all the property of Trinity and Christ Churches in the corporation of the united churches *as an individual body*, an unit, in trust for the maintenance of the Evangelical Lutheran doctrines and discipline in the congregation composed of the united churches. Not

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for the benefit of the congregation of Trinity *and* the congregation of Christ Church, as two bodies having formed a connection for certain purposes. Those separate congregations had ceased to exist. There was no longer a German society of Lutherans called Christ Church, or an ancient Low Dutch and German Society known as Trinity Church. The existence of both had been merged in the union. Their component parts, without any further distinction, constituted the single, homogeneous body or society, known as the United German Lutheran Churches.

No member of that society who came from Trinity, could say that he had any greater or better right or interest in the use or benefit of the property which the corporation derived from Trinity, than his brother who came from Christ Church, without ever having been within the walls of Trinity. The rights of each and of all were equal and upon a common footing. Each could exercise the same direction and control in their temporal affairs; and in the same manner, namely, by his vote in the choice of trustees.

But it is said that there was a further trust raised by the union bond, to wit, to rebuild Trinity Church and provide therein preaching in English at least one-third of the time.

As to the latter branch of the trust, what I have already said will suffice to show that there was no such trust attached to the property of Trinity before or at the time of the union. If it was created at all, it is to be found in the bond. There is not, however, a word on the subject in that instrument. It purports to be a union of two German Churches for their mutual benefit. The objects of the union are well and strongly expressed. And when we look beyond the writing, which does not declare that the German language is to be used, although for a German Church that would be inferred; we find that of the two uniting churches, one had never used any other tongue—that in the other the staple languages used were the German and Low Dutch, and that they came together to worship in a temple where the English was an unknown tongue, and called a pastor to preach in German exclusively. It is impossible to say, that because they had occasionally used English in Trinity, that the old Germans of Christ Church intended, in the union, to build a new church to

continue the use of that language in behalf of the united societies.

The subsequent occasional use of that language by assistant ministers in the united churches does not strengthen the inference. For thirty-seven years next succeeding the union, those instances were limited to two periods, 1794 and 1802; and in both they were of brief continuance. On no occasion, during that time, so far as the proof shows, were the efforts to have English preaching put upon the ground of a right under the union bond, or even an intention at the union that such preaching should be provided. This omission in the petition of the two hundred and five members in 1802, is evidence that there was no such contemporary understanding of the terms of that instrument.

The intention to re-build Trinity Church, does not carry with it a design to establish *English preaching* there. The design is equally inferrible, that the two churches expected to abandon Christ Church and all worship in the new Trinity whenever their increase in numbers and estate would warrant its erection.

And again they were as likely to want English preaching in Christ Church at the end of twenty years, as in any other; and they might not want it at all. Suppose that in 1802, they had rebuilt Trinity Church. What member of the United Society could then say that he was entitled to worship there, in preference to any other? Could the witness, J. D. Ressler, for instance, have said that he emanated from Trinity, and therefore had a right there to the exclusion of the children of Philip Oswald, or any other former member of Christ Church? These questions must be answered in the negative. All were equal in their rights and privileges.

To what end then, and for whose particular benefit, were the churches to make a trust for the English language, if such an idea had been in contemplation at the union?

There is still another view of this point. The persons administering the property of Trinity Church, in January, 1784, were not the donors of that property. They had no right to divert it from the original trusts upon which it was bestowed, nor to carve out new trusts in respect of it. They were simply trustees, and had come into the administration in consequence of being

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members of the society by voluntary association. They could unite with another society for the promotion of the great objects of the founders of the church, but I doubt whether they could impress upon the estate a new trust which, in the event, might possibly promote those objects, and would be quite as likely to defeat them.

Then as to the other branch of the alleged trust, the intention to rebuild Trinity Church.

Here again the inquiry arises, who were the beneficiaries in this trust? Not the former Trinity members of the United Church, because their character as such was lost at the union. There were no more Trinity, no more Christ Church people. They were all United Lutherans. And the union bond declared that they were united *inseparably*, were to *remain forever one society*, and all the estates were to be consolidated into one *common fund* for the use of the united congregation.^(a)

It is perfectly manifest that there can be nothing like a trust predicated of this declaration, that Trinity Church should be rebuilt. All the existing members of the two churches, all who had interests for the time being, as pew-holders and stated worshippers in either, were merged in one common mass of corporators. The rights of property were vested in the corporate body, to be exercised by trustees. All alike could influence their exercise. No one could set up his judgment against that of the trustees, and say, the time has arrived for rebuilding Trinity, and if you will not proceed with the work, I will file a bill in chancery on the ground of a trust, and compel you to do it. His remedy was to reason with his brethren and bring them into the same views, and then elect a board of trustees who would agree with him in opinion.

Still less can it be said that there were persons without the congregation, who could set this up as a trust. It would be positively absurd for a stranger, even for a Lutheran of another society, to interpose and tell the trustees of the United Churches

(a) See *Verplanck v. Mercantile Insurance Company*, 1 Edw. Ch. R. 84, as to the relation of trustee between a corporation and its members.

that it was high time for them to rebuild old Trinity Church ; that their means were abundant ; and the good of the community required another Lutheran Church.

The only reasonable view of the matter, in my opinion, is, that there was a design, an intention on the part of the vestries who formed the union, to rebuild Trinity Church at some future day, and to have two churches or parishes under one corporate head ; similar to the parishes of Trinity, St. Paul's, and St. John's Churches of the Protestant Episcopal Church in this city, which constitute the corporation of Trinity. They, doubtless, cherished the hope that their slender number, the impoverished and disheartened remnant of the two churches, would be increased, by emigration and other accessions, and that with increased means, they might fill and sustain two Lutheran Churches. But all this was to be the work of time, and was intrusted to the trustees of the united and inseparable society which they were organizing. It was an intention which they entertained. Their successors, representing the united society, might entertain it also, or they might abandon it. The judgment of the congregation, reflected through trustees of their own selection, was necessarily the forum to which the vestries of 1784 left the ultimate disposition of this, and all other matters respecting their temporal estates. The law of the land was their guaranty that those estates should never be diverted from the support of the Evangelical Lutheran faith. But whether that faith should be inculcated in one church or in two, in Christ Church or in a new Trinity, was left to the discretion of the next generation.

As there was no trust to rebuild Trinity, so there was no covenant or agreement to that effect which can be enforced. The parties to the Union bond, upon its execution, all became on one side of the question, and there was no party of the other part, or covenantee. The signers, if there were any contract to build, were all covenantors. The corporate body which succeeded them, represented both covenantors and all the supposable covenantees.

Next, the intention declared in the Union bond, was fully abandoned in 1805, and the site of Trinity Church sold by the United Churches. In this act there was the concurrence of the

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trustees, in whose discretion and judgment was vested the fulfilment or abandonment of that intention, and of the whole congregation who, as the members then composing the society, were the *cestui que trust*, or beneficiaries, if any trust to rebuild ever existed.

The proceeds of the sale were used for the benefit of the united congregation, as was prescribed by the Union bond. This proceeding is a perfect answer to the argument founded upon the resolutions adopted by *the vestry* of the United Churches in May, 1802, in which they say they will hold in lively remembrance the building up the church in Broadway. Three years afterwards, the Broadway lot was sold, with the assent of both the vestry and the petitioners of 1802. The *trustees*, who alone could bind the corporation, were not parties to those resolutions. And their exercise of their discretion by selling the lot, put an end to the intention which their predecessors had entertained.

It is now more than sixty years since the union of the churches.

Without resorting to lapse of time as a bar to a direct trust, the court is at liberty to presume from it, that the employment of the trust funds in a particular manner, has been by the direction and with the consent of those interested.

Thus in *Attorney General v. Scott*, 1 Vesey, Sen. 413, which was a bill relative to the election of a minister to the parish of Leeds, Lord Hardwicke held that disusage for a long time of certain prescribed acts in reference to the election, was evidence that they had been laid aside by the common consent of the parishioners.

In re Chertsey Market, 6 Price's R. 261, the trustees of a parish charity, vested, amongst other property, with a market house and ground, in consequence of the decayed state of the building, re-built the market, and with the general consent and approbation of the parish, erected it in a more convenient place within the ville. The Chief Baron of the Court of Exchequer held that it was no breach of trust.

Here, from 1784 to 1840, there was a considerable, and latterly a large body of members of this United Church, who, if the complainants' view of the Union bond be correct, at any time within

the last forty years, might have coerced the trustees to rebuild the Trinity Church. No one has attempted it, except in the way which I shall presently mention. All have rested content with the course pursued. And nearly forty years ago, all the then members concurred in the trustees selling the site of the old church, the identical ground upon which, by the terms of the Union bond, it was to be rebuilt.

If there had been something more than an intention expressed, and a discretion vested in the trustees who succeeded to the vestry of the United Churches, I think that these circumstances ought to put at rest forever any question as to the rebuilding of Trinity Church, founded upon the provisions of the agreement for the union.

The withdrawal of the suit in 1825, and the delivery up of the Union bond itself by those who prosecuted that suit, should be deemed an acquiescence in the course pursued by the corporation, by all of the now complainants who ever were members of the United Churches. Those complainants were parties in that suit, setting up the bond and seeking to enforce it. They dismissed the suit, and the President of their Council, in communicating their determination pursuant to their direction, transmitted the bond on which it was founded, to the pastor of the United Churches. This marked abandonment of the claim, in connection with the lapse of time and the sale in 1805, presents another formidable obstacle to the complainants' case founded upon the bond.

After this examination of the case, it is needless to dwell upon the claim that the acts of the defendants subsequent to the bond, in establishing English preaching, make out with the bond, a contract to build a church and endow it for that object.

It will be seen that the trustees, as such, never participated in those acts till after the purchase of St. Matthew's, and then allowed an English congregation to use their building as an experiment. The individual members of the latter, only acquired rights from year to year as pew-holders and members of such congregation.

There was no semblance of a contract to build or endow a church for the English service.

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Finally, assuming all that the complainants contend for in regard to the Union bond, what right do they present to the court for seeking to enforce it? One of their counsel went so far as to say for them, "*we are the old Trinity Church.*"

I have before shown, that no one of the complainants had been a member of the congregation of the United Churches for sixteen or eighteen years before filing this bill; and not more than two or three had ever been members of that society. The only pretence for their being the old Trinity Church, rests in the proof that the wife of one of the complainants is a grand-daughter of one who was a member of that church before the union. The right of that member in the United Churches did not survive him. It was not inheritable, and no more transmissible by descent than his Lutheran faith. The bill could not be sustained by these parties on the Union bond. Even if the two or three former members of the society could assert a claim after so long a separation from it, they could not join with them the incorporated church of St. James as parties complainant,

II. The next claim which I will examine, is that made upon the events concurrent with the erection of St. Matthew's Church.

It is said that the erection of St. Matthew's was a substituted performance of the agreement to rebuild Trinity; and that the defendants, by their corporate acts, had set it apart forever as an English Church, provided they were able to sustain it.

I am perfectly satisfied that there was *no corporate act* of the defendants in relation to the building of St. Matthew's. The resolutions, both in January and July, 1821, were the acts of a *conference* of the United Churches, or the Church Council, which, by their ordinances then in force, consisted of the minister, three elders and six deacons, convened in a mass meeting with the nine trustees. The trustees did not act as such in a conference meeting.

At the meeting on the 16th of January, 1821, there were present the minister, five trustees, two elders and six deacons; in all, fourteen persons alike entitled to vote; and if all the trustees had voted against the resolutions, they would nevertheless have been adopted. It appears that the report of the committee of the

English petitioners was accepted unanimously, and the resolutions were adopted. It is not so stated, although I infer from the minutes, that the resolutions were also unanimous. There is no statement of any dissent, and a majority of the trustees (though not summoned to a meeting of trustees) were present at that meeting of the council.

The conference or council, was a board clothed with the spiritual regulation and government of the church. It had nothing to do with the control or direction of its temporalities. The statutes vested those duties in the trustees.

The fact that a majority of the trustees were present, *acting as a council*, does not make the resolutions of the council the act of the board of trustees.

Suppose in the case of a bank, that at a general meeting of the stockholders, certain resolutions should be adopted to sell land, or do any other corporate act, and it should be made to appear that all the directors of the bank were present and assenting to what was done; the corporation would not be bound unless the directors, at a meeting of the board, should concur in the resolutions.

The directors in the bank, and the trustees in this case, are, by the charter, the select class or body which is to exercise the corporate functions. In order to exercise them, they must *meet as a board*, so that they may hear each other's views, deliberate, and then decide. Their separate action, individually, without consultation, although a majority in number should agree upon a certain act, would not be the act of the constituted body of men clothed with the corporate powers. Nor would their action in a meeting of the whole body of corporators, or of another and larger class in which they are but a component part, be a valid corporate act. In thus acting they are not distinguishable from their associates, and their action is united with that of others who have no proper or legal right to join with them in its exercise. All proper responsibility is lost. The result may be the same that it would have been if they had met separately, and it may be different. In the general assemblage, influences may be brought to bear upon the trustees, which, in their proper board, would be

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unheeded; and no one can say with certainty, that their vote in the latter event would have been the same.

It was held in the *Case of the Corporations*, 4 Coke's Rep. 77, b. that where the power to make a bye-law was in the mayor and aldermen, a bye-law made by the mayor, aldermen and commonalty, was void. And see *Ex parte Rogers*, and note a, 7 Cowen, 526, 530; *The King v. Miller*, 6 Term Rep. 268; Willcock on Munic. Corp. 101, 102; *Brown v. Porter*, 10 Mass. 99, per Sewall, J.

If, however, this were otherwise, and the concurrence of a majority of the trustees, acting in the conference, made the resolutions a corporate act; so much of them as indicated any intention on the part of the United Churches, as a corporation or society, to do any thing towards building the new church, was rescinded at a like conference meeting where all the trustees were present. If the act of five trustees in January was valid, that of the whole nine in July, convened in the same manner, must be equally binding.

When the resolutions were adopted in July, 1821, nothing had been done, so far as the proof discloses, which could not have been recalled. The bill says, considerable progress had been made in raising subscriptions;—nothing more. The subscribers, and those interested in the new enterprise, were then apprised, if they were not before, that the old church would bear no part of the expenses, either of erecting or sustaining the new church. The subscribers could have suspended their proceedings and abandoned the work. If they went forward with it, it was with full knowledge that it must be upon their own resources, and that their only union with the old church would be one for spiritual purposes.

I think, also, that the proceedings of the conference in January, 1821, do not indicate any design on the part of the old church to lend pecuniary aid to the undertaking. They proposed a subscription for the object; not to disburse from their treasury. Unless a sufficient sum was obtained by contribution to justify the erection of a new church, the money collected was to be refunded to the donors. And careful provision was made, if the enterprise succeeded, that the annual expenses of the new

church should in no wise encroach on the estate of the defendants.

It is difficult to perceive how any one subscribing before July, 1821, could have imagined, from the resolutions of January preceding, that the corporation of the United Churches were pledged to use any part of their funds in building the new church.

Aside from the resolutions of the conference, there is no testimony from which any corporate liability on the part of the defendants can be set up or inferred. The receipt of the subscriptions, prior to July, by their treasurer, was not authorized by either the trustees or the conference. The resolutions of January, 1821, provided for a deposit of the collections in the Savings Bank. In July, it appearing that they had come into the treasurer's hands, the conference directed him to hold them subject to the order of the subscribers to the fund, and discharged themselves from any farther care of the same.

The complainants do not found their claim upon their being subscribers to the erection of the new church, who paid their money upon the faith of being sustained by the defendants. They do not allege that they were contributors to it. A few of them appear to have participated in its organization, and also in the subsequent suit in equity.

Although the dismissal of that suit prevents it from being a technical bar to a new suit upon the same state of facts; yet I think that the voluntary abandonment of the suit, the procuring St. Matthew's to be incorporated as a distinct society, thus effecting an entire separation from the old church; and the subsequent lapse of time, (about sixteen years,) ought to preclude those parties who were then complainants, from any farther litigation of the matters then in controversy.

III. The complainants found another portion of their bill upon the conditions contained in the deed of St. Matthew's Church executed to them by Benjamin Birdsall.

The conveyance was in fee simple, with certain *conditions* therein expressed, which I will proceed to state. 1. That the church should be used and occupied by the defendants as a Lutheran Church, in which, except on particular occasions, divine

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service should be performed exclusively in English. 2. That in case it should be deemed expedient by the defendants to sell the church, they should, by public advertisement in a prescribed mode, offer it at the price which they had paid for it, and the cost of subsequent improvements, to such Germans, or descendants of Germans, who might then be members of, or pew-holders in the church; the purchasers binding themselves, and their successors and assigns, to use and occupy it as an English Lutheran Church. But if the offer was not accepted, a certificate that such offer was made and not complied with, was to be obtained from the Mayor, Recorder, or First Judge of the city of New York, which certificate should be conclusive proof of its contents, and then the second condition was to be void, and the defendants at liberty to convey the same free from all conditions, except the seventh and eighth. 3. Bye-laws and regulations for the government of St. Matthew's were to be made by the church council of the defendants' church, together with their minister, and the minister of St. Matthew's, and might be altered or revoked. 4. The trustees, vestry and congregation of the defendants were to call the first pastor and appoint all the officers of St. Matthew's, and fix their salaries. After the first pastor, the male members or pew-holders of St. Matthew's were to ballot for a pastor and recommend him to the trustees and vestry of the defendants, who were to accept him, or reject him and appoint another. 5. St. Matthew's Church and its officers were to be governed by the regulations to be made as before mentioned. 6. No moneys were to be expended or debt contracted on account of St. Matthew's, unless directed or authorized by the trustees of the defendants. The 7th. Related to the permanent closing of a gate on an alley adjoining the church lot. The 8th. Was in reference to a school being kept in the basement. There was a further proviso, that the defendants should not keep or put mortgages on the property to an amount exceeding \$16,000. And if there should be a sale on any mortgage, and a surplus be realized beyond the incumbrances and the total cost to the defendants, it was to be paid to the Mayor and Recorder, and applied by them to build or purchase a new English Lutheran Church.

The points made by the complainants upon this deed are, 1,

That they, the congregation of St. Matthew's, as corporators of the United German Lutheran Churches, and also as a distinct congregation, are parties to the deed, and interested in its conditions. 2. That Birdsall did not and could not destroy their interest in those conditions by his release to the defendants. And 3. That the defendants conduct and acts in respect of the conditions after the release, were a contemporaneous exposition of their effect, in accordance with the complainants claim.

The complainants have entirely failed to prove any trust or understanding between the corporation of the United Churches and Birdsall, prior to their purchase of St. Matthew's, other than what may be derived from the deed; or any trust which attached to Birdsall on his purchase at the auction sale.

Mr. Birdsall, within about a year after his sale of the church, published a pamphlet giving an account of his agency in that affair, and he testifies that the pamphlet is true in every thing but a matter of opinion therein expressed. In that publication it appears that the sale of the church at auction was positive and without reserve, and the auctioneer notified bidders that the officers of the church had not authorized any person to bid for their account; and whoever did bid, would do it on their own responsibility; and Birdsall, in his written proposition to the defendants, announced that he had made the purchase solely and on his own account.

He testifies that one inducement for his selling the church to the defendants was, his believing, from conversations with individuals in their society, including their minister, that it would be kept as an English Lutheran Church.

All this was expressed in the conditions which were inserted in his grant to them, and whatever was not expressed, must be taken as abandoned before the completion of their purchase.

It is plain that Mr. Birdsall had a perfect title to the church, unaffected by any trust or understanding. He could have sold it to the Roman Catholics, if he had thought proper to do so. His pamphlet shows that he did intend to sell it to the Episcopalians if he could not sell to the defendants. Whatever was the consideration of the sale, it was therefore a consideration in which he was interested solely and exclusively. Looking at the deed

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for our information, we learn that he sold the church in consideration of the price which he had paid for it, and of the conditions under which the grantees received it.

It is said that the property was then worth \$30,000. It had brought but \$22,750, at a public sale two months before, which is one test of its value. But assuming that it was worth \$30,000: the difference of \$7250 belonged to Birdsall, and to him alone. On that assumption, I may say that on the sale being made to the defendants, they contributed \$22,750, and Mr. Birdsall \$7250, to the common object of vesting the church in the defendants corporation for charitable uses. The defendants already had in possession their \$22,750, for a specified charitable use, from which they could not divert it, viz.: the support of the Evangelical Lutheran doctrine and worship. If language were to be deemed a portion of the use on which they held it, (which is one of the points urged by the complainants in reference to a prior era of their church,) then they could only apply that property for the support of German preaching, and the diversion of it in the purchase from Birdsall to the maintenance of English preaching, would have been a clear breach of trust.

But waiving that point, this corporation invested the \$22,750, for the eleemosynary purposes of its institution; and Mr. Birdsall invested the \$7250, having in view the English tongue, as the instrument to be used in effecting those purposes.

The inquiry then is, what was the nature of the estate, legal and equitable, which the defendants acquired by Birdsall's deed? On the one hand, it is contended that the estate was conditional; on the other hand, that it was a trust.

In the first place, the language of the deed is that of a grant upon conditions. The words are, "*upon the conditions following,*" and "*provided, nevertheless,*" &c.

When the deed was executed, there was no person except Birdsall, who had an interest in the conditions, or could enforce them. In a trust, the *cestui que trust*, or beneficiary, can require it to be executed. Here there was no person, or class of persons, then in being, who were named as *cestuis que trust*, or who were intended as such. The deed discloses none. It cannot be said that the congregation of the extinct corporation of St. Mat-

thew's was in view, because the proof shows that they had already left and organized the new church of St. James, or were engaged in organizing it, and presently attached themselves to it. Nor can it be said with propriety, that the prospective English congregation which was to be gathered in St. Matthew's under the new arrangement, were the *cestuis que trust*. The deed shows that, so far as they were to belong to any class or society known to the law, that congregation was to be a dependency, a species of colony of the United Churches; and, like many colonies of modern nations, were to be governed by the parent state, without having any voice or part in such government. In short they were not to be incorporators or members of the United Churches. They might become members of the English congregation of St. Matthew's, and worship in the church, so long as the owners should think it meet to hire pews to them, and keep up the English service there. The extent of their right would be for the year that they rented their pews. No one could compel the defendants to admit him to hire a pew in the first instance, or to continue it to him a second year. And no member of the English congregation to be convened there, could have a vested right in any thing pertaining to the church beyond the period for which he rented a pew, or contributed in some other form prescribed by the defendants, to the support of the service in such church. In either mode, his right would rest upon his compact with the defendants for the period specified for such pew-rent or contribution, and not upon Birdsall's deed. I am convinced that the deed contained no trust for any person or persons, or any class of persons, who could claim for themselves the character of *cestuis que trust*.

The only rational mode of construing the deed, is, to hold that it created a *charitable use*; the fund for which flowed from the defendants and Mr. Birdsall. They were the exclusive donors of the charity. In this deed they defined its purposes, and created the defendants the almoners for its dispensation. As such almoners, the defendants were vested with the exclusive power of selecting the objects of the charity. They could admit whom they pleased to hold pews in the church; they could exclude such as they pleased, including Mr. Birdsall himself. But they could

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not suspend the exercise of the charity, by discontinuing English preaching, and devoting the church to some other use; at least without the consent of their associate donor. In using the word *charity*, I intend it only in its proper legal sense, which embraces churches, colleges, and all eleemosynary institutions.

To recur to the complainants view, what were the vested rights which any one, or all of the English congregation which the Rev. Mr. Geissenhainer, Jr. collected together in St. Matthew's under the new regime in 1827, had under, or by virtue of this deed? Neither the one nor the whole were donors of the fund, grantees of the estate, or heirs to the conditions reserved. They were simply Lutherans who had come into that congregation to worship, because they approved of the service and the locality. They contributed nothing but their pew rents, and for those they received the stipulated remuneration in the occupation of the pews, and having the English service administered to them under the defendants auspices, and chiefly at their expense. When their terms in the pews expired, their interest in a legal sense was at an end.

I will put a parallel case, by way of illustration. Two benevolent persons propose to try the experiment of establishing a Lutheran Church in the eastern part of our city, for the benefit of German emigrants, and to that end to have the service in German, as long as it should be deemed expedient. One contributes \$20,000; and the other \$5000. They buy a suitable place of worship, procure it to be conveyed to a mutual friend, expressing the donors names, and the objects for which it is to be used. The largest contributor undertakes, in addition, to pay the expenses of sustaining the service. He accordingly hires a minister, the house is opened for public worship, sundry German residents come in and form a spiritual society, and the service is kept up for three years at a considerable cost to the principal donor. He then finds that the society is but a handful, and he concludes it is not sufficiently numerous to warrant the expense which is required to keep up the German service. He confers with his associate donor, who agrees with him in this conclusion; and the associate, in consideration of the other's having sustained the service three years, and his undertaking to devote the edifice

which they bought to pious uses for all time to come, joins with the principal donor and the friend in whom the legal title is vested, in executing a conveyance, transferring the title to the principal donor, discharged from all conditions, save that it be perpetually devoted to the substituted pious uses.

Could any member of the German Society collected in such church, gainsay such a transfer? Most assuredly not.

It would doubtless be unpleasant to that society to be broken up and dispersed. But they would have acquired no legal right to be kept together at the expense and charge of the founders. If strong enough to buy a place of worship and sustain themselves, they could still continue together. If not able to do that, it is a misfortune, for which, in their case, there is no remedy. They have no vested right, which enables them singly, or as a class, to insist that they shall always have the benefit of the church and the service so provided.

If the donors had both died without any revocation, the charity would have to be enforced in the name and behalf of the sovereign people by their Attorney General. I speak of a charity which is not vested in any corporate body. And it would be no longer revocable, or subject to alteration, except by the legislature. (*Attorney General v. Mayor of Rochester, 2 Simons' R. 34.*)

Almost all charitable uses raised by a single individual have been given by will. Hence we have very few instances of any revocation or change in them, made by the donors; and no adjudication respecting them, so far as I have seen.

Without going the length of holding that an unqualified gift for a charitable object when executed by delivery, may be revoked or diverted by the donor; I have no doubt but that, in the case before me, it was perfectly competent for Mr. Birdsall to release, and extinguish the conditions which he had annexed to the grant of this property. They were, by operation of law, reserved to him as the grantor in the deed. (*Cruise's Digest, Title 13, ch. 1, § 17, and ch. 2, § 42 to 50.*) He was the only person from whom the consideration (if any there were) for those conditions had proceeded. No person, or persons, had acquired a vested interest in their performance. The interests of the

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English congregation did not continue beyond the day of the annual renting of the pews, and rested more upon the contract for the pews, than upon the conditions in the deed. That temporary and usufructuary right was respected by the defendants.

When the defendants found, in 1830, after a fair trial of the experiment, that it did not answer their expectations, they were at liberty to sell the church to any person or society, after offering it to the English Lutherans then worshipping there. No one can imagine on the case before me, that the mere handful then remaining in St. Matthew's would, or could have purchased it. Other Lutherans were not embraced in the terms of the pre-emption. It had virtually come to this point, that the defendants would no longer waste their income to furnish English preaching in an empty church; and unless permitted to use it for their own large congregation, would have sold it absolutely. The alternative was thus presented to Mr. Birdsall, whether it should be sold and thus go to strange, and perhaps obnoxious owners, or whether he would discharge the conditions in his deed, thereby securing its perpetual devotion to the purposes of a Lutheran Church. He preferred to relinquish the use of the English tongue, to suffering it to be desecrated by strangers to the Lutheran faith. The only change made by the release, was to leave the defendants at liberty to use such language as they pleased. I speak now of the real and essential change. I have no doubt of his right to permit this change; and I cannot say that he acted unwisely.

The release executed by Birdsall on the 2d of April, 1830, therefore discharged the defendants from the conditions contained in his deed of the property in question; and from that time they held it subject only to its being used as a Lutheran Church.

The offer to sell, subsequently made by the defendants in the terms of the second condition, and their treating with the English vestry, and allowing English preaching half the time, cannot affect their legal rights. There was no waiver at any time; and if in January, 1840, the then trustees had been persuaded that Birdsall's release was unavailing, and had expressed that opinion, it would be of no weight; of no more than was Bird-

sall's assertion in his pamphlet, that he had the unquestioned right to release if he pleased. A mistaken view of the law, and of their rights, could not, of itself, change the law, or impair those rights.

I have said nothing of the standing of these complainants in respect of this question. Some of them, certainly, present a curious claim, when they ask the court to declare that they are or were parties to Birdsall's deed, or interested in its conditions. I allude to the nine complainants who were the vestry of St. James's Church.

It is illustrative of the expansive as well as vague and indefinite character which is sought to be impressed upon the conditions in this deed, that a separate and distinct incorporated church, which never worshipped in St. Matthew's up to the commencement of this suit, should be struggling under cover of those conditions, to effect a permanent lodgement of its whole body, in that church edifice.

I am called upon to uphold those conditions, not in favor of the congregation which came in under Mr. Geissenhainer, Jr., and gradually wasted away between 1827 and 1840; but in favor of an entirely distinct society, whose real grounds for coming into this church appear to be, that they are Lutherans, worship in English, number among their members several who in bye-gone years worshipped in St. Matthew's, and that the church had become conveniently empty of English worshippers, so that there was room for St. James's.

As to the allegation that the defendants pursued a tortuous course to obtain a partial possession of the church, and thereupon to turn out the English party; it is sufficient to say, that they took the full and entire possession in December, 1826, when the prior English church of St. Matthew's left in a body and went to St. James's. The defendants have had the legal possession ever since. Their allowing an English congregation to worship in the church, was no ouster of their own possession.

Some stress was laid upon the contribution of members of St. Matthew's towards the defendants purchase of Birdsall.

The only proof on this subject is the admission in the answer, which is, that at the time of the purchase, \$2613 69 was by

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various persons contributed towards enabling the defendants to make the experiment of maintaining English worship in St. Matthew's. It does not appear that any of the complainants, or any prior member of St. Matthew's Church, contributed. And it is proved that the experiment, for three years, cost the defendants nearly double the amount so contributed.

The omission of the word "assigns," in Birdsall's release, was urged as showing that he did not mean to discharge the whole, or more than his own right as a member of St. Matthew's congregation. The release was to the corporation and their successors. No other words were necessary to release in fee.

IV. There remains one prominent point on which the complainants ask a decree, viz. the offer of the defendants to sell St. Matthew's, as made in December, 1839, and the complainants acceptance of that offer in January, 1840. This is insisted upon as a contract, which should be specifically performed.

Although the point is based upon a contract, some other matters are brought in with it, which I will first mention.

Thus it is connected with the second condition contained in Birdsall's deed; which having been released, has no bearing upon the case. And the recorder's certificate is of no consequence, except as it contains terms making a part of the offer to sell.

So the idea that the complainants, or the parties offering to accept and buy the property, have a right to set-off the Union bond, or any thing else, against the purchase money, is to be laid wholly out of view.

The defendants are to be regarded as the owners in fee in possession of this property, subject to no restriction except that it shall be used for a Lutheran Church.

I will now look into the offer and the acceptance.

The offer was signed by the Secretary, and purported to be and was made by order of the defendants trustees. It described the property sufficiently, and offered to sell it "*to such Germans or descendants of Germans who may be members of or pew-holders in St. Matthew's Church, at \$22,750, the purchasers binding themselves, their successors and assigns, to use and oc-*

copy the same as a Lutheran Church, in which divine service should be performed in the English tongue. The notice stated that the board of trustees would meet at St. Matthew's Church at eight o'clock P. M. on the 3d, 10th, 17th, 24th, and 31st of January, 1840, in the vestry room, and that written applications to purchase, designating the names and addresses of the proposed purchasers, would be received by the board, if delivered to their attorney, Mr. Derry.

The first acceptance tendered, was dated January 6th, 1840, and was signed by Mr. Cammeyer, one of the complainants, and he thereby agreed to take the church for the sum of \$22,750, in trust for an English Lutheran congregation in said church. The "*Terms of payment to be agreed upon.*"

Mr. Cammeyer was the descendant of a German, and a member and pew-holder in St. Matthew's Church.

The second acceptance, dated January 16th, 1840, was signed by Messrs. Birdsall, Otten, Reinicke, Aims, Surre, and Cammeyer, as a committee of Germans or descendants of Germans as described in the offer, duly appointed. It ratifies Mr. Cammeyer's acceptance, (which was inclosed in it and again sent,) and thereby in behalf of their constituents, they agreed to purchase the church on the terms in the defendants notice mentioned, provided a good and available title were given under the authority of the court of chancery, or otherwise as counsel might advise. They claimed a written assent on the part of the defendants, and notified them that their omission to give such answer, would be taken as a tacit assent, and the contract enforced accordingly. The word "*purchaser*" was appended to Mr. Cammeyer's signature.

On the 29th of January, 1840, another letter was delivered to the defendants board, signed by Messrs. Cammeyer, Otten, Reinicke, and Birdsall, as a committee; informing the board, that so soon as the deed was prepared by them and approved of by the committee's counsel, Mr. Anthon, the signers would pay them the price, which they were then ready to do. The deed to be made to such persons in trust for the congregation of St. Matthew's, as counsel on both sides might deem discreet; and the committee were prepared, in the mean time, to execute any con-

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tract to bind the congregation of St. Matthew's which might be deemed prudent, and which might be approved by their counsel.

The defendants made no answer to either of these proffers or acceptances.

It is charged upon them that they were not sincere in offering to make the sale; and their course in omitting to answer the persons proposing to accept, or to explain to them wherein their proposals were deficient, gives color to the accusation. With the morality of the proceeding, this court has no concern. I am not to decide whether they did right. It is my duty to ascertain whether they entered into an obligatory contract for the sale of this property.

And 1. It is objected that the defendants offer was made to the world at large, or to a large class of persons; and that there could be no contract until the portion of such class which proposed to accept, was ascertained and accepted by the defendants as the purchaser.

There is much force in this argument, especially as it is contended on the other side, that a part only of the class described in the notice, were entitled to avail themselves of the offer. Thus, if after the offer of acceptance made by Mr. Cammeyer, or after the second acceptance tendered, and within the time limited, there had been another acceptance tendered by four other German pew-holders in St. Matthew's: to which set of purchasers would the defendants be bound? And if, on receiving the first proposal, they had executed a deed accordingly, would that relieve them from the consequences of the last proposal? There is nothing in the notice which gives to the first acceptors any preference over any others who may come in before the 31st of January.

The difficulty can be obviated only by holding, that all the class described, should join in the acceptance; or that there would be no contract, until the defendants had received and accepted the proposal of such of the class as should offer to purchase. The clause in the notice relative to receiving *applications to purchase*, corroborates the latter construction. On neither ground, are the defendants liable to complete the sale.

2. It is evident that the notice contemplated no *executory con-*

tract between the parties. It was an offer, for a fixed price, with notice of the times and place where the board of trustees were to be found to complete the sale. They designed to receive the applications, act upon it, receive the price, and deliver a deed. It was not necessary that they should add to their notice, that the sale would be for cash. The law adds that, where there is no offer or agreement to sell on credit. *Roys v. Ayerst*, 6 Madd. (1 Madd. & Geld.) 316, 325; *Hogan v. Shorb*, 24 Wend. 460, per Bronson, J.

3. If any acceptance short of that of the whole class of pew-holders, Germans or the descendants of Germans, would have met the offer, it should have been unconditional, and given the names and addresses of the proposed purchasers. And it should have been followed up, by a tender or direct offer to the board, to pay them the price. (*Wells v. Smith*, 7 Paige, 23, 24; per Chancellor.)

There is no proof of any such tender or offer. The letter of the 29th of January, announces that they are ready to pay the price, as soon as the deed is prepared and is approved by their counsel. That was not sufficient; but if it were, it is not proved.

There is no evidence of any intention, on the part of any or all of those proposing to accept the offer of sale, actually to pay the \$22,750, or any part of it; much less that they were prepared to pay it. On the contrary, the claims made in the bill, and the points and arguments of the complainants at the hearing, show beyond question, that they did not intend to pay for the property otherwise than by setting off against the purchase money, the Union bond and the various other equities which have been heretofore examined. If those claims had been valid, and the acceptance tendered had completed a contract, these parties could not have offset them and required a deed. It was a sale for cash, not for old claims. By the acceptance, the parties agreed to pay in cash. And they must pay or tender it, or they lose the benefit of the purchase. (See *Dawson v. Dawson*, 8 Sim. 346.) Where the sale is on a credit, the case would be different.

There are many other questions arising upon the force of the defendants offer and the alleged acceptance.

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4. In relation to the first proposal, which was made by Mr. Cammeyer.

The defects in it are two. *First*, it is made by Mr. C. alone, whereas the offer of the defendants cannot be satisfied by the acceptance of less than two of the prescribed class of persons. The clause by which he proposes to take the church in trust for an English Lutheran congregation, does not remedy this difficulty. There would still be but a single purchaser, and if conveyed in trust, but a single trustee, neither of which events is contemplated by the offer of sale.

Second. It is an insuperable defect, that Mr. Cammeyer did not accept unconditionally and without qualification. Instead of saying he would take the church and pay the price, which would have been an agreement to pay in cash; his acceptance was clogged with a proviso that the terms of payment were thereafter to be agreed upon. In other words, it was no more than saying that he was ready to buy at \$22,750, if they could agree upon the terms of payment.

There was no meeting of the minds of the contracting parties upon all the essential points of the agreement. One proposed a payment in cash in hand, the other a payment in some other mode or time to be settled between them. This was not an acceptance of the offer. In *Eliason v. Henshaw*, 4 Wheaton's R. 225, the plaintiff wrote to the defendant offering to buy two or three hundred barrels of flour at a certain price, and requested an answer whether the offer was accepted, by the return of the freight wagon which carried the letter. The letter was written near Harper's Ferry. The wagon did not return there, and the defendant answered the letter by mail, addressed to Georgetown where the plaintiff resided, and thereby accepted the offer. It was decided that the acceptance being communicated to a different place from that indicated by the plaintiff, imposed no binding obligation upon him. Mr. Justice Washington, delivering the opinion of the court, said that the offer of a bargain by one person to another, imposes no obligation upon the former until it is accepted by the latter according to the terms in which it was made. Any qualification or departure from those terms, invalidates the offer, unless the same be agreed to by the person who made it.

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Mr. Sugden, speaking of contracts by letters between the parties, says, "The letters will not constitute an agreement, unless the answer to the offer is a simple acceptance, without the introduction of any new term." (1 Sugd. on Vendors and Purch. 165 —(118) Chapt. 3, Sec. 3, § 14.)

The English authorities fully sustain this doctrine.

In *Kennedy v. Lee*, 3 Merivale, 450, 451, Lord Eldon held, that where the acceptance of a proposal of sale, left some essential particulars to be afterwards settled, there was no evidence of a contract. In *Boys v. Ayerst*, 6 Madd. (1 M. & Geld.) 316, 324, the offer provided for payment within a fortnight after a certain building should be removed from the premises sold. The acceptance was to pay within a fortnight after its removal, the plaintiff to name the time within which it should be removed, and such time to be inserted in a formal agreement. It was held that the latter clause added a further term to the offer, which required the assent of the other party before it became a contract.

In *Holland v. Eyre*, 2 Sim. & St. 194, the proposal was to buy of Holland, a lease for ninety-seven years, which he was to have of one Burton. Holland's letter in answer, accepted the offer, and agreed to grant a lease to Eyre on the same terms as the lease he held from Burton. It was held that Eyre was not bound, because his offer was to take *an assignment of the lease*, and the acceptance was restricted to granting *an under lease*.

In *Rutledge v. Grant*, 4 Bing. 653, (1 Moore & Payne, 717, S. C.) the defendant offered in writing to purchase a house on specified terms; *possession to be given on or before the 25th of July then next*, and the plaintiff to give an answer within six weeks. On the 6th of April, and within three weeks, plaintiff wrote a note to the defendant accepting the offer, and stating he *will give possession on the 1st of August then next*. Defendant on the 7th of April wrote, desiring to withdraw his proposal, and the plaintiff would not assent. After this, and within the six weeks, the defendant withdrew his proposal, and the plaintiff sent a note to him acceding to his original offer, and agreeing to give possession on or before the 25th of July. The plaintiff tendered a conveyance, and the possession before that day, which being rejected, he sued the defendant upon the contract. The court

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decided, that before the offer was accepted, the defendant might withdraw it; and that the plaintiff's first note accepting with a modification as to the possession, was not an acceptance of the offer. The Chief Justice said, that until both parties are agreed, either has a right to be off.

In *Smith v. Surnam*, 9 Barn. & Cres. 561, Smith, the owner of growing trees, agreed verbally with Surnam, to sell him the timber at so much per foot. Afterwards Smith wrote to Surnam requiring him to pay for the timber which he had bought of Smith. Surnam wrote a letter in answer, stating that he had bought the timber, but it was to be sound and good, and that it was not sound.

It was held to be a contract for the sale of goods, and not for an interest in lands. And that as the purchaser did not in his letter recognize the absolute contract described in the vendor's letter, but stated one conditionally as to quality, there was no note in writing of the bargain to satisfy the statute of frauds.

In *Hyde v. Wrench*, 3 Beavan, 334, the defendant by writing, offered to sell a farm for £1000. The complainant, in answer to this, offered him £950; which, after a few days consideration, the defendant declined. On the day he received the refusal to take £950, the complainant wrote a letter agreeing to the terms of the offer at £1000. No specific answer was made to this letter. On a bill to compel the defendant to perform the agreement, the court decided that no binding contract existed between the parties. That by the offer of £950, the complainant rejected the offer to sell at £1000, and it was not competent in him to revive the proposal of the defendant by subsequently tendering an acceptance of it.

On these grounds Mr. Cammeyer's note cannot be deemed an acceptance of the offer of sale.

5. The next proposal to accept, came from him as purchaser, and as one of a committee agreeing in behalf of the class to whom the church was offered, to purchase it on the terms specified in the notice. They describe themselves as "*a committee of such Germans*," that is, of Germans or the descendants of Germans who were members of, or pew-holders in, St. Matthew's Church,

As they were *a committee of such Germans*, the letter was equivalent to a statement that the committee-men were also such Germans; and the defendants had a right to infer that their constituents were just such Germans as the members of the committee.

Now it appears that Mr. Birdsall, one of the committee, was neither a German nor the descendant of a German. It is not proved that any of the others were, except Cammeyer. But if they were, it is proved that Mr. Surre was not a member or pew-holder in St. Matthew's, and it appears by the bill, that he as well as Messrs. Aims and Ogden, were members of the board of trustees or vestry of St. James's Church.

Thus, four out of the seven members of the committee, did not belong to the class of persons to whom the defendants offer was made. And as their acceptance was in behalf of themselves and persons like them, it was not an acceptance by *such Germans* as those to whom the offer was made. The defendants did not offer the church to a mixed class of Lutherans, consisting of Irishmen, of office-bearers in St. James's Church, and also of members of St. Matthew's, who were Germans, or German descendants. The offer was to the latter exclusively; and they had no right to associate with them, either of the former.

If I should offer to sell a house to my friend A., the acceptance of the offer by A. and a stranger B., would impose no obligation upon me.

A further objection to the letter of the committee is, that it formally ratifies the offer made by Mr. Cammeyer. It proceeds to say, that they agree to purchase on the terms in the notice mentioned; but as Cammeyer's offer required the terms *of payment* to be agreed upon, the word *terms* in the committee's letter would, on construing the two offers together, be limited to the other stipulations and conditions contained in the notice, excluding the time of payment. It was thus subject to the same difficulty of its being a qualified acceptance.

If this construction be not clear, it is at least left in doubt upon the two letters, whether the committee intended to accept, payable in cash on delivery, as the offer was, or to negotiate the terms of payment.

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And where there is such a doubt, the court will not decree a performance of an agreement resting upon letters. (*Huddleston v. Briscoe*, 11 Ves. 591, per Lord Eldon, Chancellor; *Stratford v. Bosworth*, 2 Ves. & Beames, 346, per Sir Thomas Plumer, Vice-Chancellor; and see *Abeel v. Radcliff*, 13 Johns. 297.)

There is still another objection to this offer, so far as it purports to have been made in behalf of others. The authority from the others is not proved.

6. The third letter of acceptance is founded upon and refers to the second. It, of course, is not of any greater force.

This letter is also signed by Mr. Birdsall, who was not within the offer, and it departs widely from the offer, in substituting a conference of counsel on both sides to determine in whose names the title shall be taken, and proposing a formal executory contract to be executed in the meantime.

7. Every contract for the sale of lands is void, unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and be subscribed by the party by whom the sale is to be made. (2 R. S. 135, § 8.)

The defendants offer, though signed by them, constituted no agreement. (*Burnet v. Briscoe*, 4 Johns. R. 235.)

If the proposals made by Mr. Cammeyer and others, are to be deemed as making a contract in connection with that offer; the only consideration for it on the part of the defendants, is the promise on the part of those gentlemen to accept the lands and pay the price. Taken together, they make a contract resting upon mutual promises.

By the statute just cited, the consideration must be expressed in the writing subscribed by the party making the sale. In other words, if the consideration be the promise of the purchaser, that promise must be expressed in the writing which the seller executes.

There is no such instrument in this case. The offer signed by the defendants contains no expression of the consideration upon which they are sought to be charged.

The effect of the change made in this respect in the revision of our statutes in 1830, is to require contracts for the sale of lands resting upon mutual promises, to be subscribed by both the buy-

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er and seller, to be obligatory on the latter; and it has virtually done away with the making of contracts for the sale of lands by letters between the parties. A happy consummation, which Lord Eldon was desirous of having accomplished in England.

The Chancellor has decided, that under our present statute of frauds, a contract for the sale of lands, must not only be in writing and signed by the vendor or his agent, but it must be subscribed by the purchaser also. (*McWhorter v. McMahon*, in chancery, Nov. 21, 1843.)(a)

See also *Davis v. Shields*, 26 Wend. 341, in the Court for the Correction of Errors, decided on the clause of the statute relative to sales of goods and chattels.

On these various grounds, I must hold that no valid contract was made by the defendants for the sale of St. Matthew's Church.

8. If the complainants had succeeded in substantiating a claim to the specific performance of the alleged agreement for the sale of St. Matthew's on the part of those who accepted it; the complainants are not those vendees, nor are they members of the class of persons to which the church was offered, or in behalf of which it was avowedly accepted. The vestry of St. James's Church did not belong to that class, and had no right or interest in the contract.

V. As to the complainants point that several of the defendants trustees are aliens, I might pass it by, with the remark that their right is not to be questioned in this mode. I will add, that there is nothing in the point. The title is in the *corporation*, which is not an alien, even if all the corporators were aliens. The latter have no vested rights as *cestuis que trust*, in the real estate. And if they had, it would be their rights, and not the legal estate of the corporation, which would suffer the consequences of their alienage.(b)

(a) Since reported, 10 Paige, 386.

(b) On this point, see *March v. Attorney General*, 5 Beavan, 433; also *Bligh v. Brent*, 2 Y. & Coll. 268.

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Our banks, insurance companies, trust companies, rail-road companies, and innumerable other corporations, whose property is represented by transferable shares, own large amounts of real estate; and a large number of their shares of stock are owned by aliens, both resident and non-resident. In such stock they have an absolute and vested interest, which in degree and character is wholly unlike the mere right by sufferance, which is held by a pew-holder from year to year in a church. Yet I believe it has never been questioned, but that aliens had a perfect right to own stock in those corporations, and to officiate as directors if the stockholders thought proper to intrust them with that duty.

In *The Commonwealth v. Woelper and others*, 3 Serg. & Rawle, 29, 34, 40, which was a suit relative to an election held in the same Lutheran Church of St. Michael's in Philadelphia, which I have before spoken of, it was decided by the Supreme Court of Pennsylvania, that aliens had a right to vote under a provision in the charter which declared that the officers should be chosen by the contributing members being communicants of the congregation.

VI. The defendants made some formal objections to the bill and to the relief prayed.

1. That the bill was multifarious. It was said at the hearing, that a demurrer on this ground had been overruled by the Vice-Chancellor. The decision on the demurrer cannot be reviewed here.

The misjoinder of the complainants is another difficulty. I have observed heretofore, that many of these complainants do not, in any form or aspect of this case, show any title to participate in the relief sought; even if the others had established the claims, or any of them, which are brought forward in the bill.

This is unquestionably a fatal objection to the bill. (*King of Spain v. Machado*, 4 Russell, 225; *Paige v. Townsend*, 5 Simons, 395; *Cowley v. Cowley*, 9 *ibid.* 299; *Clarkson v. De Peyster*, 3 Paige, 336; *Anderson v. Wallis*, 4 M. & C. 336, affirmed, 1 Turn. & Phill. 202; S. C. 5 Lond. Jur. Rep. 458, and 7 *ibid.* 119.)

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I have examined the cause without regard to these technical grounds, because a decision upon them alone, would only lead to a renewal of a litigation which ought to be deprecated by all who value Christian order, peace, and brotherly kindness.

The bill must be dismissed, with costs, and the injunction dissolved.

RAWSON'S ADMINISTRATRIX v. COPLAND.

Where land is conveyed subject to a mortgage for which the grantor is personally liable, and the deed declares that the grantee is to pay the mortgage as a part of his purchase money; he is liable to the grantor for the amount of the mortgage, *as the same becomes due*, in an action of assumpsit.

If the grantee executes the deed, he will be liable therefor in an action of covenant. The contract made by the assumption in the deed, is not one of indemnity merely.

It is a contract to pay; and the grantor in the deed may enforce it without actual payment made by him.

The liability of the grantee by force of such an assumption, is a *demand* against him, which in the event of his death, may be set off in favor of the grantor, in a suit brought by the legal representatives of the grantee upon a contract for the payment of money.

B. bought four lots of ground, and executed mortgages thereon to P. for the purchase money. Then B. sold and conveyed the lots to C. subject to the mortgages, which the latter by the deed, was to pay as a part of the price. C. sold and conveyed the lots to R. in the same manner. After R.'s death, the mortgages were foreclosed, the lots were sold, and there was a large deficiency in satisfying the mortgage debt, which B. paid to P. B. then demanded the same of C., who paid him by his own bond and a mortgage on land. In a suit by R.'s administratrix to foreclose a bond and mortgage given by C. to R., it was held that the amount of the deficiency was a demand existing against R. in his lifetime, which C. might set off against the bond and mortgage sought to be foreclosed.

Also held that the costs paid by C. to B. were not within the contract of R., and could not be set off.

Where a creditor accepts the debtor's bond and mortgage in payment, it is as to third persons equivalent to an actual payment. *Semble*.

Nov. 11; Dec. 7, 1844.

THE bill was filed to foreclose a mortgage executed by the defendant, to the intestate, Edward B. Rawson, on the 25th of September, 1837, accompanied by a bond of the same date.

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The defence was a set-off claimed against the intestate and his estate, under the circumstances stated in the decision.

Besides the principal objection to the proposed set-off, it appeared that no actual payment of the deficiency on the Prince mortgages, was made by the defendant to Bennem; but the latter accepted as full payment and satisfaction of the demand, the defendant's bond and mortgage to him on other real estate. There was no proof as to the value of this security.

E. Paine, for the complainant.

J. Dikeman, for the defendant.

THE ASSISTANT VICE-CHANCELLOR.—The revised statutes provide that in suits brought by executors and administrators, demands existing against their testators or intestates, and belonging to the defendant at the time of their death, may be set off by the defendant in the same manner as if the action had been brought by and in the name of the deceased. (2 R. S. 355, § 23.)

In suits for the payment or recovery of money, in the court of chancery, set-offs are to be allowed in the same manner and with the like effect, as in actions at law. (2 *ibid.* 174, § 40.)

It has been decided in this court, that on a bill to foreclose a mortgage, or to obtain satisfaction of the amount due from the defendant, he may set-off a debt due to him from the complainant which would be the proper subject of set-off in a suit at law brought by the latter to recover the amount due. The debt thus to be set off, must be actually due at the commencement of the suit; and unliquidated damages cannot be set off against a mortgage. (*Chapman v. Robertson*, 6 Paige, 627; *Holden v. Gilbert*, 7 *ibid.* 208; *Jennings v. Webster*, 8 *ibid.* 503; *Roosevelt v. Bank of Niagara*, Hopkins' R. 579.)

The inquiry in this case, therefore, is whether the defendant, in a suit at law brought by the intestate upon the bond accompanying the mortgage now sought to be foreclosed, could have set-off the demand which he has set up in this suit; and whether this was a demand against the intestate at the time of his death.

The material facts on this point are these. On the 25th of

September, 1835, J. Bennem bought of Anna Prince, four lots in the city of Brooklyn, and to secure a part of the purchase money, executed to her two bonds and mortgages for \$1900 each, payable in five years with annual interest. Each mortgage was upon two of the four lots.

On the 1st of May, 1836, Bennem conveyed two of the lots to the defendant, one of the lots being embraced in one of Prince's mortgages and the other lot in the other mortgage. The consideration expressed in the conveyance was \$3200, and it was made subject to the payment of \$950 on each of those mortgages, with an assumption thereof by the grantee in these words; "which said sums are to be paid by the said party of the second part, and form part of the purchase or consideration money above expressed."

On the 1st day of November, 1836, the defendant conveyed the same two lots to the intestate Rawson, for the consideration of \$3200 as expressed in the deed, and subject to the payment of \$950 on each of the two mortgages executed by Bennem to Prince. The deed contained an assumption of the payment of the same by Rawson, in the same words which were used in the conveyance by Bennem to the defendant.

Rawson died in January, 1840. After the Prince mortgages became due, they were foreclosed, and these two lots were sold in February, 1841. There was a deficiency upon each lot in paying the amount charged upon them respectively, which Bennem was compelled to pay; and the defendant pursuant to the agreement in his deed paid it to Bennem by a bond and mortgage, before this suit was commenced.

The defendant claims to set off this deficiency against the mortgage in question.

There can be no doubt but that the defendant was liable to Bennem for the deficiency, and that Rawson if he had survived would have been in like manner liable to the defendant. (*Halsey v. Reed*, 9 Paige, 446.) If this suit had been commenced by the intestate himself, the defendant's right to make the set-off would have been perfect, assuming the payment to have been made. But it is contended by the complainant that this was not a demand existing against the intestate in his lifetime.

One test of his position is this. Could the defendant have

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maintained an action for this claim in the lifetime of Rawson, provided the mortgages had then been due. The circumstance that the demand was not due and in arrear at the death of the intestate, makes it none the less *a demand* against him.

Nor is it material whether the remedy be at law or in equity.

The complainant's argument is, that there was *no demand* existing, till the defendant had been damnified, and had paid the debt assumed by the intestate. He contends that the intestate's contract was one of *indemnity* merely, and not one which the defendant could enforce, whether Prince called for the money or not.

Now let us suppose, to make the question plainer, that the intestate had signed and sealed the deed, in which he was the party of the second part. It would then be a covenant made with the defendant, that he the intestate would pay \$950 on each of the mortgages. No time when he should pay it is expressed, but it would be unreasonable to hold that he was to pay it before the mortgages fell due. To state it in full, it would be a covenant with the defendant, to pay to Prince \$950 on each mortgage, as the same became due, for which payment the defendant was liable by his assumption with Bennet. I have no doubt but that on such a covenant, the defendant might have sued the intestate, the moment that the mortgages became due, without paying the money himself or waiting to be damnified.

In *Port v. Jackson*, 17 Johns. 239, affirmed unanimously in the Court for the Correction of Errors, *ibid.* 479; one Barlow in 1791, demised a lot of land to Port for 1600 years, at the yearly rent of £32 17. Port assigned the lease to Jackson, and in the assignment Jackson covenanted with Port to perform all the covenants in the lease. The declaration alleged that Jackson had not paid the rent for twenty-four and a half years next preceding. It was objected that Port could not recover, without showing that he had been compelled to pay the rent to the lessor, Barlow; and that until such payment, the covenant was not broken. The court held that the covenant was broken, the moment the day of payment was past and the rent was left unpaid; and that Port was entitled to recover the whole amount of the rent unpaid. The distinction is between an undertaking to do an act in *dis-*

charge of the plaintiff, as to pay his debt; and one to acquit and discharge him from all *damages* by reason of his debt or obligation.

The reasoning of Judge Van Ness delivering the opinion of the Supreme Court, and of Chancellor Kent, on the writ of error; is elaborate and conclusive.

In the matter of *Negus*, 7 Wend. 499, the question arose upon a bond given by Negus to his partner Sinnott, on purchasing the interest of the latter in their joint operations. The bond recited various contracts and debts for which Sinnott was liable, and the condition was that Negus should apply the property of the firm to the payment of the debts and of all costs and damages to which Sinnott might be liable on account of those debts. It was decided that although this was a bond of indemnity, it was also a bond to pay and discharge the debts, and that Sinnott had a *demand* by virtue of the bond, without showing that he was damaged or that he had paid any of the debts.

The case of *Negus* was under the statute relative to absconding debtors, and the point there was, as in this case, whether the claim was a *demand*. The decision is therefore directly in point.

There are several authorities in England to the same effect, or applying the same principle. (*Cornwallis v. Savery*, 2 Burr. 772; *Hodgson v. Bell*, 7 T. R. 97; *Holmes v. Rhodes*, 1 B. & P. 638.)

There is a case in 14 Johns. 177, (*Douglass v. Clark*), which has been deemed inconsistent with these decisions. It was not argued, and the judgment is very brief; and for its weight, I refer to Chief Justice Savage's remarks in the case of *Negus* before cited.

I have considered this claim as if it rested upon a covenant arising by the intestate's execution of the deed. The only difference which that makes, is in the form of the remedy. If in the case supposed, the intestate could have been sued in covenant, there is no reason why in the case as it is, he could not have been sued in assumpsit, or in equity. If in the one case, there would have existed a *demand* against the intestate, so there would in the other. In each case it would be a *demand* existing

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from the date of the deed, and falling due at the maturity of the mortgages.

In this view, the intestate's obligation was a direct liability in his lifetime, to the defendant, payable at a future day. It was therefore entirely unlike the case of the drawer of a bill, or the indorser of a note, as against the acceptor or maker, before payment by the former.

There is no force in the objection that the damages are unliquidated. The amount which the intestate was to pay was as definite as if he had given his promissory note.

The result is, that the defendant is entitled to set off against the complainant's mortgage debt, so much of the Prince mortgages as was left unpaid by the intestate or his representatives.

As the set-off does not depend upon the fact of payment, it is immaterial whether the transaction between the defendant and Bennem was a payment or not.

Bennem testifies that he received the defendant's securities as payment, and he gave a receipt in satisfaction of the claim. I do not perceive why that ought not to be deemed a payment, especially as it regards third persons; but it is unnecessary to decide the point.^(a)

On the principle by which this set-off is sustained, it must be restricted to the balance of the debt which is unpaid by the sale, excluding the costs. The assumption in the deed was a direct promise to pay a specific sum. There was no promise to indemnify the defendant against damages and costs.

The defendant is not entitled to the costs of this suit, and the complainant's costs must be limited to the amount of an ordinary foreclosure where there is no defence.

^(a) See on this subject, *Witherby v. Mann*, 11 Johns. 518; *New York State Bank v. Fletcher*, 5 Wend. 85.

MANN, Receiver of The Catskill and Canajoharie Rail Road
Company v. F. PENTZ.

THE SAME v. W. A. F. PENTZ.

THE SAME v. ZADOCK PRATT.

The remedy provided by the thirty-sixth section of the article of the revised statutes relative to "Proceedings against Corporations in Equity," is limited to creditors who have proceeded to an execution against property, without effect.

The thirty-ninth and fortieth sections apply to *manied incorporations* only; and as to those, give a remedy to the attorney general, or to any creditor or any stockholder, where the corporation is insolvent, or has violated its charter or any law binding upon it.

The thirty-sixth section is applicable to all corporations, except the religious, library and school institutions enumerated at the close of the article.

The forty-second section, and all the subsequent sections in the same article, apply to proceedings instituted under section thirty-six, as well as to those instituted under sections thirty-nine and forty.

Hence, a receiver of a rail road company, appointed in a suit commenced against it under the thirty-sixth section, is clothed with all the powers and authority conferred upon receivers by the forty-second section and the several other sections which it refers to and adopts.

A receiver under section thirty-six, has authority to sue for and collect all debts and demands belonging to the corporation.

Under the forty-second section, such a receiver may recover sums remaining due upon any shares of stock subscribed in the corporation.

This remedy is given by the statute; it may be exercised although no call has ever been made for the sums remaining unpaid on the shares; it is concurrent, and may be enforced at law or in equity; and a suit in equity for that purpose may be maintained against each stockholder severally.

Semb. that in respect of contribution, a suit in equity may be maintained against all the delinquent shareholders jointly.

A receiver prosecuting a shareholder for the unpaid balance of his stock, is not restricted in his recovery to the amount of the debt due to the creditor of the corporation who procured his appointment. He is the officer of the court, acting for all the creditors and stockholders.

Nor is it an answer to his suit, that there are other shareholders who are more delinquent than the defendant in the suit; nor that such creditor is himself a delinquent stockholder. If the receiver acts oppressively in enforcing the payments due on the stock, the court will interfere either on a cross bill bringing in the favored parties, or on a summary application.

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A shareholder holding one hundred shares of stock, on which more than half of the nominal amount had been paid, by an arrangement with the directors, received full scrip for sixty shares, and soon after relinquished the remainder to the corporation. On the corporation subsequently passing into the hands of a receiver, it was *held*, that the creditors, and the other stockholders who did not assent, were not affected by that arrangement, and that such shareholder must make the whole hundred shares full stock, if it were necessary in order to discharge the corporate liabilities.

An order for a receiver, when his appointment is completed, vests in him, in equity, all the property and effects subject to the order, without any assignment.

In respect of the receiver's exercise of his powers in courts of law, an assignment to him by the party is proper, and as to the legal title to real estate, it is indispensable. But in equity, although usual in our practice, it is unimportant; and in England it is not practised.

An assignment, purporting to be executed by a corporation through its president and under its corporate seal, was produced, and the president's signature proved, and there appeared to be a seal attached; but there was no evidence whether the seal was that of the president or of the corporation.

Held, that the court could not decide that point upon inspection, and that the execution of the instrument was not proved.

Nov. 14, 1844; January 6, 1845.

THESE suits were commenced by the receiver of The Catskill and Canajoharie Rail Road Company, against three of its stockholders, to compel them to pay up their shares in its capital stock. They were substantially alike in the pleadings and testimony, and were heard at the same time.

It appeared that the company in question was incorporated on the 19th of April, 1830, with a capital of \$600,000, divided into shares of fifty dollars each; which the legislature in 1837, authorized to be increased to a million of dollars. The Messrs. Pentz were original subscribers for the capital stock, each taking fifty shares; and they had paid all the calls made upon them by the company, and seven per cent. in addition, amounting in the whole to thirty-six dollars on each share. Thus, there remained unpaid fourteen dollars on their respective shares, or from each of those defendants, \$700.

A. Van Vechten, a creditor of the corporation who had obtained a judgment at law and issued an execution thereon which was returned unsatisfied, filed a bill in the court of chancery, for a sequestration of the company's property and effects.

On the 9th of December, 1842, an order for a sequestration

was made in that suit, and a receiver of all its property directed to be appointed, to whom when appointed, the order required the company and its officers to assign the same. On the 9th of January, 1843, the complainant was duly appointed receiver in pursuance of that order.

He filed the bills in these causes on the 3d of August, 1843, and beside the facts before stated, alleged that there were several thousand dollars of debts owing by the corporation; and that with all the assets, there was not sufficient due from solvent stockholders, on their unpaid shares, to discharge those debts. There was however no valid proof in support of the latter allegation.

The answers stated, and so it appeared, that several of the stockholders had not paid as much on their shares as had the defendants; and it further alleged that if all who were able were made to pay up, there would be a balance coming to the defendants on what they had already paid. That Van Vechten was a stockholder who had not paid on his shares; and that all the stockholders were necessary parties to the suit.

As to the defendant Pratt, he was not an original subscriber, but in 1840, after the last call was made, he became the purchaser of one hundred shares, the scrip for which was duly transferred to him. On the 30th of December, 1840, by an arrangement between him and the directors, (expecting which he bought the stock,) sixty shares were made full stock, and the residue of the \$32½ previously paid on each of the one hundred shares, was credited on the remaining forty, being \$6½ on each share. And the 40 shares were afterwards relinquished by him to the company.

J. Van Vleck, for the complainant.

S. Sherwood, for the defendants.

THE ASSISTANT VICE-CHANCELLOR.—The first and most important objection made to the complainant's claim, is that he is a receiver merely as at common law, and that he has none of the powers conferred by the 42d section of the revised statutes rela-

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tive to proceedings against corporations in equity. (2 R. S. 464, § 42.)

There may still be a question whether the receiver under the 36th section of the same statute is not clothed with the power assumed by this bill, even if the 42d section is not applicable to such receiver.

1. As to the force of the 42d section. The 36th section of the statute, is limited to creditors of corporations who have wholly exhausted all the remedies which courts of law afford for the collection of their debts; and if their demand be a decree, it applies when an execution against the property of the corporation has been returned unsatisfied.

The section directs a sequestration of the stock, property, things in action and effects of the corporation, and the appointment of a receiver. Section 37, provides that on the final decree in the cases under the 36th section, the court shall cause distribution of the property of the corporation to be made among the creditors, in the order provided in the article relative to the voluntary dissolution of corporations.

The 39th and 40th sections apply only to *monied corporations*, and they enable the Attorney General, or *any creditor* or *any stockholder*, of such corporation to apply for a receiver where the corporation is insolvent, or has violated its charter or any law binding upon it.

Under these sections a creditor may apply before attempting to collect his debt in the courts of law.

Section 41st permits the court on such application to appoint one or more receivers to take charge of the property and effects of the corporation, and to collect, sue for and recover the debts and demands due and property belonging to it.

These three sections are unquestionably limited to *monied corporations*.

The 42d section is in these words. "Such receiver shall possess all the powers and authority conferred, and be subject to all the obligations and duties imposed, in article third of this title, upon receivers appointed in case of the voluntary dissolution of a corporation."

It is not denied that the authority given in the third article here

referred to, is ample for the institution of this suit. But it is contended that the 42d section and all those following it in article 2d of the title of the statutes which I have cited, are limited to monied corporations and have no application to rail road companies.

There is, in truth, some obscurity in the provisions of the second article of this statute.

The word "*such*," before "receiver," in section 42d, is one ground for restricting that section to receivers appointed under section 41st, the immediate antecedent. But if that limitation had been intended, the more appropriate expression would have been, "*such receiver or receivers*," because the 41st section provides for one or more receivers. And the expression "*such receiver*," is not inconsistent with its being applicable to all the receivers previously spoken of in the second article.

Again, there is also an evident want of precision in the several sections. All the powers conferred upon the receivers of monied corporations under the 41st section, are again granted in the general provision made by the 42d with much additional power and authority. (See § 42, 67 and 68, and 2 R. S. 42, § 7.) I think the explanation of this, as well as a key to the effect of the 42d section, is to be found in the origin of the provisions under consideration.

They came from the act of 1825, "to prevent fraudulent bankruptcies of incorporated companies, and to facilitate proceedings against them." (Laws of 1825, Ch. 325, page 448.)

The fifth section of that act, gave to an unsatisfied judgment and execution creditor, *of any incorporated company*, the same right to a sequestration and receiver, as is contained in the 36th section of the revised statutes. It also provided for an equal and proportionate distribution among the creditors; and for compelling a discovery of the property of the corporation by its officers and others.

The seventeenth section allowed the Attorney General, or any creditor, to pursue the remedy against *incorporated banks*, which is now contained in sections 39 and 40, of the revised statutes; and it authorized the court to appoint a receiver of the property of the company and distribute it among the creditors.

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Thus the statute of 1825 gave no remedy to stockholders, and the direction as to distribution of the effects of banks, omitted to prescribe the order and mode, except by reference to the fifth section.

In the revision of our statute law, this act was distributed and was incorporated with additions, in various parts of the revised statutes.

A part of the fifth section is in section 36th and another part of it in section 37th of the article relative to proceedings against corporations in equity, as I have before stated. This remedy was extended to creditors by decree as well as by judgment.

Another portion of section fifth, that relative to compelling a discovery, &c., is found in section 51st of the same title; by which transposition, it is applicable as well to proceedings under the 39th section, as to those under section 36.

And the provision for an equal distribution of the assets contained in section five, is re-enacted in section 79th of the third article of the same title of the revised statutes, and by reference to that article in article second, is applied to the proceedings under the 36th and 39th sections.

The seventeenth section of the act of 1825, was similarly re-enacted in sections 39, 40 and 41, of the second article before mentioned; and in other sections of the same title. Its provisions were extended to insurance and loan companies; and stockholders are enabled to avail themselves of the remedy which they afford.

The revised statutes pursuing the former act, thus provide two distinct adverse remedies against corporations, one of which is applicable to all, and the other to monied incorporations only.

The first is open to an unsatisfied judgment and execution creditor, without the production of any other evidence of its necessity, than the fact that he has pursued his remedy to the utmost verge of the law.

The second is open to any creditor or stockholder; but he must show that the corporation is insolvent or has violated its charter.

In each case a sequestration ensues; and a receiver is appointed, who is to take charge of the stock, property, things in action, and effects of the corporation. The 41st section works

a *sequestration* as effectually as the 36th, although that word is not made use of in section 41st.

The final result under each mode of proceeding is the same, namely, a distribution of the property of the corporation among its creditors. (See § 37, 42, 48, 79.)

In each case the court proceeds upon notice to the corporation, (*Devoe v. Ithaca and Owego R. R. Co.*, 5 Paige, 521;) and in both cases, whenever a receiver is appointed, nothing short of the payment of the debt of the complainant, will avoid an entire distribution of the corporate effects, and the winding up of the corporation.

Such being the effect of the statutes, I can perceive no reason why a receiver appointed under the one mode of proceeding, should not have been clothed with the same power as one appointed under the other.

Under the act of 1825, from which all these provisions were derived and re-enacted, the receiver, under section 5th, was co-extensive with the one under section 17th, and indeed section 5th was the principal section; applying to all classes of corporations, having more full language in respect of sequestration and the property to be held by the receiver, and containing the only direction for the final equal distribution of the assets.

Instead of any indication of an intention to abridge the remedies in the re-enactment, they are very considerably extended and enlarged.

I think that all the sections in article 2d, succeeding the 42d, are clearly applicable to all corporations. These with the 42d are new provisions, designed to carry out more effectually and systematically, the previous remedies. Section 43d allows the creditor to make the directors or stockholders parties, where they are made liable by law for the *payment of the debt in any event or contingency*.

Whether this refers to the liability of directors in consequence of fraud or misconduct, such as is pointed out in relation to monied corporations in the first volume of the revised statutes, I need not decide here. It undoubtedly includes the absolute and direct liability for the corporate debts, which in some of our acts of incorporation is fixed upon directors or stockholders, or

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upon both. This species of liability is very common in manufacturing corporations, and some others.

Among the great number of *monied corporations* existing at the time of the revision of the statutes there were probably some containing this personal liability; but they were so few compared with the very large number of manufacturing companies which were subject to that liability, that I am satisfied the latter were within the intention of the legislature in this enactment.

The words "*such application*," in § 43, are equally applicable to the proceeding under both sections.

And the subsequent words "*any corporation*," are very comprehensive, and if the former words were doubtful, would extend the 43d section to all the applications previously spoken of.

Section 44, is for any creditor of *a corporation*. If it be said that the word *such* before "directors or stockholders," limits its force to the proceeding under § 39; the answer is that it is no more than equivocal, and the generality of the former expression must prevail.

Section 45 applies to all corporations and there is no qualifying expression by which it can be restricted to those mentioned in § 39.

Sections 46 and 47 relate to the proceedings under the 45th.

The 48th to the 50th inclusive, are apparently applicable to any corporation; and the sections from 51 to 56 inclusive, are expressly made to apply to the whole article.

The Chancellor decided in *Judson v. The Rossie Galena Company*, 9 Paige, 598, that section 56th applied to proceedings under the 36th section.

This review of the various provisions, shows that after the appointment of the receiver, there is no difference made in the subsequent proceedings under sections 36 and 39; unless it be in the powers of the receiver. The 42d section, if applicable to both modes of proceeding, makes the whole article consistent and harmonious. If it be restricted to that under § 39, and the receiver's whole power is derived from the statute; it leads to the absurdity of authorizing a proceeding by which the corporate property is all taken from its officers, vested in a receiver, and there suspended till distributed under a decree, without any pow-

er in the receiver to collect debts or preserve it if perishable. If it be said that the receiver under § 36, as a common law receiver, may sue and collect debts and demands and secure the corporate property, it is not certain that it does not concede the whole argument. This I may be obliged to speak of in another place.

I am fully convinced, that having in view the origin of these two modes of proceeding enacted in the revised statutes; their object and effect, the various subsequent sections manifestly applicable to both, the inconsistency of limiting the 42d section to the one under § 39, and the absence of any reason for such restriction; I should grievously err, if upon the mere use of the words "*such* receiver," in section 42d, I should restrict its operation to the "receiver or receivers" appointed under section 39.

I have examined the point thus minutely, not only because of its great importance, but because I was much pressed with the weight of a very high authority in favor of the other construction. I allude to the opinion of the Chancellor in the case of *Verplanck v. The Mercantile Insurance Company*, 2 Paige's R. 438, 452. The suit was one under the 39th section of the article which has been discussed, so that the observations of that very learned judge in reference to the 36th section, although entitled to profound respect, are not controlling. If they were, I should be relieved from the difficult task of examining the point. The Chancellor speaks of the great powers now conferred upon receivers appointed under section 39th, by the 42d section. He says the order appointing them is in effect a final order in the cause, and works a virtual dissolution of the corporation: That a different kind of receivership is authorized by the 36th section, which is the same kind of receiver that was authorized by the seventeenth section of the act of 1825: That those were strictly common law receivers; such as are usually appointed to protect the fund during a litigation; and they have no powers except such as are conferred upon them by the order for their appointment and the course and practice of the court.

It may be observed that if the receiver authorized by the 36th section is co-extensive with the receiver which was authorized

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by the 17th section of the act of 1825, the present complainant has all the authority which he claims.

This court refused to interfere at all in these cases prior to the act of 1825. (*Attorney General v. Utica Insurance Company*, 2 Johns. Ch. R. 371; *The Same v. The Bank of Niagara*, Hopk. R. 354.)

The act of 1825 was consequent upon the latter decision.

His honor the Chancellor's understanding of the force of that statute, may be seen by his action under it when its benefits were asked at his hands soon after its passage. *In the matter of the Franklin Bank*, 1 Paige's R. 85, he made an order for a receiver of that bank, on the petition of a creditor under the 17th section of the act of 1825. Chancellor Kent was appointed, and he was authorized to collect and convert into money all the debts and securities of the bank, and to sell all its property at auction. This operated as a virtual dissolution of the corporation. Subsequently the Chancellor applied the rule of equality in the distribution, to the effects in the hands of the receiver of the Franklin Bank. (1 Paige, 249, 255.)

In the ensuing year (1829,) in the case of *The Attorney General v. The Bank of Columbia*, the Chancellor made an order to appoint a receiver of that corporation under the same seventeenth section of the act of 1825, and on an appeal from his decision, the question was incidentally discussed in the Court for the Correction of Errors. (1 Paige, 511; 3 Wend. 588.) There does not appear to have been any doubt of the propriety of delegating to the receiver, if one were proper, all the powers conferred by the Chancellor's order, in such cases. And in the instance of the Bank of Columbia, the order was as full as in that of the Franklin Bank, and both institutions were wound up and their effects distributed under the act of 1825.

Thus it appears that under that act, the court clothed receivers with all the powers which are now usually granted in proceedings under the 39th section. The revision of the statutes was contemporary with the application of these powers under the act of 1825; the revisers and the legislature were doubtless cognizant of the Franklin Bank proceeding, which was a matter of great public notoriety; and the enactment of the entire provis-

ions of the 5th and 17th sections, with additions and improvements, indicates with these facts, that there was no intention to restrict the extent of the power of receivers in such cases. If such had been the design, the settled construction of the act of 1825, admonished the legislature to make a clear and decided limitation of the powers of the receivers, where they were deemed excessive in practice.

The subject has again been before the Chancellor recently, in the case of *Nathan, Receiver, &c. v. Whitlock*, 9 Paige, 152, (S. C. 3 Edw. Ch. R. 215;) which I think is an authority in favor of the complainant, although the question is not examined at large in the judgment of the court. The receiver in that case was appointed under *the 36th section* of the article in the revised statutes, in the matter of the Mohawk Insurance Company. This appears in 3 Edw. Ch. R. 222, from the remark of the Vice-Chancellor in the report of the case, and I have examined the petition for his appointment, and the testimony in the suit of Nathan, which disclose the same fact. The precedent given in Edwards on Receivers, 263, is the identical order appointing Nathan to be receiver.

The form of the petition is also given in the same book. The order appointing the receiver recites that the company was insolvent, but there is no such allegation in the petition. The latter was drawn up in view of the 36th section of the statute. It contains some allegations conformable to section 38, but none that would bring it within the 39th section.

As such receiver Nathan filed a bill to compel Whitlock to pay the amount of a note which the company had held for the capital stock taken by him, and which he had got cancelled without payment, by an arrangement effected by him by means of his being a director of the company. The company was insolvent at that time.

It was objected by Whitlock throughout, that the receiver could not enforce this claim, or any other which the corporation itself could not maintain. So the defendant here insists that as a common law receiver under section 36th, the complainant has no right to enforce payment of stock which the corporation itself could not enforce, there being no call directed or made. In ref-

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erence to this, the Chancellor says, in *Nathan v. Whitlock*, (p. 159,) "The receiver is the proper person to bring the suit, as he has the legal title to all the property of the company; being vested by the revised statutes with all the rights given by law to trustees or assignees of insolvent debtors." And he cites 2 R. S. 464, 469, § 42, 67 and 68.

Whitlock appealed to the Court for the Correction of Errors, which affirmed the decree of the Vice-Chancellor and Chancellor, on the 29th of December, 1842. In his printed points, he insisted that Nathan as receiver could not maintain the suit, and the points on the part of Nathan maintained his right to sue under the 42d section before cited.

It is true that in the report of the case in 9 Paige, 152, the fact is mentioned that the Mohawk Insurance Company had become hopelessly insolvent before the receiver was appointed; but it is not stated that the receiver was appointed on that ground; and I cannot imagine that in a suit so severely contested as that case was throughout, any such mistaken assumption in regard to the origin of his appointment could have prevailed in the minds of either the counsel or the court.

With this authority confirming my own conviction of what is the true construction of the statutes, I must hold that this receiver has all the powers conferred by the 42d section of the article relative to proceedings against corporations in equity, and the other sections which it refers to and adopts.

2. If this were otherwise, the cases of the Franklin Bank and the Bank of Columbia show to what a great extent the brief language of the 36th and 37th sections of that article carries the power of the court in these receiverships.

So the order made by the Chancellor under which this complainant was appointed receiver, directs the corporation to transfer and deliver to him, all their property real and personal, their equitable things in action and effects. It gives to him authority to demand, sue for and collect all debts and demands belonging to the corporation, to dispose of their personal property, and to demise their real estate.

3. The order therefore, independent of the question on section

42, authorizes this suit, provided the defendant's liability to fill up his stock, were a *demand* belonging to the corporation.

My conclusion in regard to the first proposition makes it unnecessary for me in this place to express any opinion on that point.

4. By the 69th section of the third article (2 R. S. 469,) receivers, are directed to proceed and recover sums which may be remaining due upon any shares of stock subscribed in the corporations of which they are receivers; and for that purpose they may file a bill in chancery or commence an action at law. -

I did not understand the defendant's counsel as denying that this section extended to the complainant, if the 42d section of the previous article were deemed applicable to him. The Chancellor, in disposing of this receiver's petition against the stockholders, to which I was referred, (3 Barbour's Notes of the Chancellor's Decisions, 13, March 7, 1843,) merely declined to express any opinion as to the receiver's right to compel payment from the stockholders, whose stock was not paid in. He said that if the receiver had such right, the order appointing him gives him all the necessary authority.

5. It is contended in behalf of the defendant, that if the receiver has any remedy against the stockholders separately, it must be by an action at law; and that if he proceeds in equity, it must be against all the stockholders equally. Section 69, allows the receiver to file a bill or to sue at law. And he may do either when *any share* remains unpaid, in order to recover the sum due thereon.

The language of the statute is as plain to maintain a separate suit in equity as at law. The concurrent remedy is expressly provided, it is wholly a statute remedy; and a court of law may with as much propriety say to a suitor for its benefit, that chancery was a more appropriate forum, as I can say to this complainant, that his case is one to which a court of law is well adopted, and therefore he is bound to proceed there.

By the seventh section of the general act relative to manufacturing incorporations, (3 R. S. 222, 2d ed.,) the stockholders are made *individually* liable for the debts of the corporation, to the extent of their respective shares of stock. That liability is quite

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analogous to the defendant's. His is restricted to the amount remaining unpaid on his shares. The word, *individually*, in the section just cited, means *personally*, not severally.

Under that section it has been held by the Supreme Court that the liability is several and not joint. (*Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473; and 5 Hill, 461.)

In *Penniman v. Briggs*, Hopk. R. 300; S. C. on appeal, 8 Cowen, 387; one question was, whether under that section, there could be any bill in equity; the section not mentioning the court in which the stockholders should be charged. The jurisdiction in this court was sustained, on the ground of the contribution among the many shareholders, who were made defendants.

This was before there was any statute giving equitable relief in express terms. It perhaps shows that the complainant might have joined all the stockholders in one suit, and there are many good reasons why that should have been done. But it does not show that he must unite them all in a single suit.

In *Hume v. The Winyaw and Wando Canal Co.*, 1 Carolina Law Journal, 217, also reported in 4 Amer. Law, Mag. 92, Chancellor De Saussure in an able and eloquent opinion held that the corporators were severally liable in equity to the creditors of the company; independent of any statutory provision in regard to the court in which they should be prosecuted.

6. As to the objection that there are stockholders delinquent upon calls which the defendant has fully paid, whose arrears are more than sufficient to pay the debts of the corporation. I think it is erroneous to suppose that in these cases the sequestration can be limited to the amount of the debt of the creditor in whose suit it is ordered. It carries the whole corporate effects into the hands of the receiver. (*Morgan v. New York and Albany R. R. Co.*, 3 Barbour's Notes, 30, per Chancellor, May 2, 1843.)^(a)

The corporation is deemed insolvent from its suffering the execution to be returned unsatisfied, and for aught that appears, its concerns are to be wound up.

I do not think that the receiver was bound to prove in this suit,

(a) Since reported, 10 Paige, 290.

the extent of the debts of the corporation. If he is acting oppressively in enforcing the liability of one stockholder, while he omits to collect of others who have paid in less upon their shares; the defendant may by a cross bill, bring the latter before the court with the receiver; or he may by the action of the court, compel the receiver to enforce the liability of such delinquents, and on the final adjustment, receive back the excess, if he has paid any, on his shares. Such defendant has an undoubted claim for contribution, (*Judson v. Rossie Galena Co.*, 9 Paige, 603, 604,) although it may be involved in delay and difficulty in its practical results; a consequence not unusual in complex partnership and corporate liabilities.

7. It is set up that Van Vechten the creditor, in whose suit the complainant was appointed, is himself liable upon stock which he subscribed, to more than the amount of his claim against the corporation; and that this constitutes an equitable set off, and ought to defeat this suit.

Van Vechten's liability was before the Supreme Court in an action on his subscription, and the opinion of the court with a copy of which I was furnished, is adverse to its validity. I need not decide upon it. The receiver is the officer of this court, acting for all the creditors and stockholders, (*Davis v. Duke of Marlborough*, 2 Swanst. 125.) He is not the agent of Van Vechten, nor in any manner his representative exclusively. This suit is not Van Vechten's suit, and strictly it should not be prosecuted by his solicitor or counsel, (*Ryckman v. Parkins*, 5 Paige, 543; *Ray v. Macomb*, 2 Edw. Ch. R. 165.)

8. I have yet to notice some formal difficulties in the complainant's case.

He omitted to produce the proof of his appointment, which fact is put in issue by the answer; and it is urged that he has not proved any assignment to himself as receiver.

As to the appointment, the evidence of it being upon the files of the court, I permitted the complainant to produce it subsequent to the hearing. It will be subject to the defendant's further objection, if any there be, upon its production.

The assignment to the receiver is not proved. The signature of the president is proved, and that the instrument has a seal to

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it ; but whether that be the seal of the president, or of the corporation, there is no evidence. The production of the assignment will not aid, because the seal cannot prove itself. The court cannot say upon inspection that it is the corporate seal of the rail road company, with any more propriety than it can say that the signature of the president is genuine upon a like inspection.

For all purposes in a court of law, the assignment to the receiver is no doubt proper, and in regard to real estate and the legal title, indispensable. I do not think that it is so important in equity.

Here the court, having ample power for the purpose, has sequestered the effects of this corporation, and through its officer, the master, has appointed a receiver of such effects. The order gives him full power to take possession of all the corporate property, and to sue and collect its demands. It also directs the company and its officers to assign, transfer and deliver such property to the receiver.

In my judgment, the effect of this order was to vest the property in the receiver, when he was appointed, as effectually *in equity*, as if the assignment had been made in due form. The latter operates only by force of the order. The court having ordered it, no sanction of a board of directors could be necessary to carry it into effect. The property is transferred by operation of law, by means of the order of the court ; and equity looking at the substance, will hold the transfer accomplished which has been decreed. (See *Edw. on Rec.* 83 ; *In the matter of the Eagle Iron Works*, 8 Paige, 386 ; *Eldred v. Hall*, 9 *ibid.* 640.)

It has become our usual practice to have an assignment executed to receivers. This is not the practice in England. There the proceeding is deemed complete and effectual on the master's appointment and the filing of the requisite recognizance. (1 *Smith's Ch. Pr.* 628, 635.)

The complainant is entitled to a decree for the amount unpaid on the defendant's shares.

Under the circumstances, the decree will be without costs, and the complainant may in addition to the proof of his appointment, furnish evidence of the execution of the assignment to him, if he deems it advisable.

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The case of Col. Pratt differs from the foregoing in this fact only, that his stock was divided, and full scrip issued for a part. This does not affect the creditors of the company, or other stockholders who did not assent to the arrangement. The law requires him to make the whole full stock, if that be necessary for the discharge of the corporate liabilities.

There will be the same decree as in the suits against the Messrs. Pentz.

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The allowance of interest as an incident to a debt, is founded on the agreement of the parties: and such agreement may be express or implied.

It is implied, where there is a contract to pay the principal at a specific time, and the debtor makes default; interest being chargeable from that time, upon the ground of the default.

Where such payment is to be made on the conveyance of land at a stipulated period, and the land is not then conveyed, the purchaser is not in default if he omits to pay the price, and no interest is recoverable against him until he is put in default by the tender of a deed.

The general rule in England is, that from the time fixed for the completion of a contract for the sale and conveyance of land, the purchaser is entitled to the profits of the estate, and will be compelled to pay interest upon the price. And the agreement to pay interest, is implied from the purchaser's receiving, or being entitled to receive, the rents and profits.

This rule is modified here, by the difference in the situation and productiveness of real estate, and the higher rate of interest; and in the case of vacant or unproductive property, a contract to pay interest will not be implied, when the purchaser is prevented from obtaining his title through the default or negligence of the vendor. The entry into possession of such property ought not to affect the principle.

And where the purchaser does not go into possession, under or in pursuance of the contract of sale, and the delay in its completion is imputable to the seller, he will not be charged with interest on the purchase money, in the absence of an express agreement to pay interest.

S. & M. being joint owners in possession of several lots, under a lease which contained a covenant for a sale and conveyance to the lessees at their option at a fixed price, tendered the price to the lessor's heirs and representatives, and demanded the title; but the latter, by reason of infancy and other causes, were unable for a long period to convey the same. S. then signed an agreement by

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which he covenanted to execute a perfect conveyance to M. of all his right and interest in one of the lots, (which was vacant,) on the 1st of May, 1830, in consideration of a large price to be then paid or secured by M.; and when the legal title was obtained, he would give any further assurance, &c. S. made no effort to complete, or to convey his own interest to M. at or before the day fixed; and early in 1831, he repudiated the agreement, denied its obligation, and disclaimed M. as being the purchaser. M. nevertheless proceeded, and erected a valuable store on the lot, the income from which exceeded the whole cost of both store and lot; and at the same time he made similar erections on the joint account, on the other lots of himself and S. In 1836, S. filed a bill, amongst other things, calling on M. to complete the purchase of the lot, and a conveyance was finally in readiness for M. in 1841.

Held, that M. did not enter into possession under his contract with S., and the character of his previous possession was not changed. That S. was not entitled to interest on the stipulated price from May 1, 1830, nor until he made or offered a full conveyance of his right and title in the lot; but he was entitled to the value of the rents in the intervening period as the same would have been derived from the lot, in the condition in which it was when he contracted to sell to M.

Commission, is not limited to a compensation or per centage on the receipt, payment, or transmission of money, or its equivalent. † It is an allowance to a factor, broker, agent, or other person who manages the affairs of others, for his services therein; and is usually ascertained by a per centage on the value of the property sold or amount of the business done.

Under a decree for an account of joint operations in real estate, the master was directed to allow no commissions. *Held*, that this excluded an allowance for superintendence and management of the joint property.

The agreement under which the account was directed, was to make advances for a purchase. The account embraced those, with large disbursements also, and the decree restricted interest on all *advances* to six per cent. *Held*, that the disbursements were not included in the restriction.

November 12, 13, 1844; January 6, 1845.

THE bill in this cause was filed by John B. Stevenson against the heirs, devisees and legal representatives of Thomas Stevenson, together with Hugh Maxwell, whose wife was one of the devisees; embracing a great diversity of matters. It sought an account between the estate of T. Stevenson on the one side, and the complainant and Mr. Maxwell on the other side, in respect of a lease granted by the testator to one Bradshaw, which those two gentlemen had purchased in 1828. This account was taken under the decree, and no question arose upon it on this occasion. It also claimed a specific performance of an agreement made between the complainant and Maxwell, for the sale of one of the Bradshaw lots to the latter; which performance was acceded to

by Maxwell and the decree directed it accordingly. The principal question was under this agreement.

The bill also asked for a settlement of the accounts between the complainant and Maxwell, in respect of their joint operations growing out of the purchase of the lease ; and the decree directed such accounting.

The master having made his report on the accounts between those parties, including the purchase money of the lot sold to Maxwell ; the latter took three exceptions to his report, which now came on to be heard.

The facts elucidating the exceptions will be found in the opinion of the court.

H. Maxwell in person, and *Murray Hoffman* for Mr. Maxwell.

W. Silliman, for the complainant.

THE ASSISTANT VICE-CHANCELLOR.—I will first examine the complainant's right to interest upon the purchase money of his half part of the Cedar-street lot ; that being the first point in the order of time, which the case presents.

On the 14th of November, 1828, Mr. Maxwell and the complainant, became the purchasers for their joint and equal benefit, of a lease of that lot and of adjoining lands held by one Bradshaw. The demise was from Thomas Stevenson, and contained a covenant to convey the property in fee at a stipulated price. Mr. Stevenson was dead and his title had been transmitted to sundry persons under his will, several of whom entitled to estates in remainder, were infants. The complainant and the wife of Maxwell took interests under the will ; the latter for her life only. In 1829, Mr. Maxwell in behalf of himself and the complainant, offered to pay to T. Stevenson's legal representatives and other parties entitled to receive it, the requisite sum for the purchase of T. Stevenson's title, pursuant to the terms of the lease, and requested a performance of the covenant and a conveyance of the property.

The lease was assigned by Bradshaw to Mr. Maxwell, who

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took possession of the premises in November, 1828, for the benefit of the complainant and himself.

On the 29th of January, 1830, the complainant agreed to sell to Maxwell his undivided half of one of the lots into which the Bradshaw premises were subdivided, at the rate of \$500 per foot on Cedar-street. The lot was twenty feet and some inches in front by sixty feet in depth, and at the stipulated price, amounted to \$7708. It was at that time, a vacant and unimproved lot.

The complainant executed a written agreement for the sale, by which, in consideration of the price above stated, to be paid or secured on the first day of May then next, he covenanted to execute a full and perfect conveyance of all his right and interest in and to the moiety of the lot, and also covenanted that when the legal title to the lot was obtained, he would do any legal act to convey his interest in the lot on payment of the stipulated price.

The complainant executed no conveyance or transfer on the 1st of May, 1830, nor until since the decree in this cause. Mr. Maxwell made no tender of the price. It appears that on that day, the complainant was indebted to him for about half the price, for advances made under the agreement for the purchase from Bradshaw. No active measures were taken to obtain the title from the devisees of T. Stevenson, until this suit was instituted in 1836, and it was accomplished by the decree under which the account in question was stated, which decree was entered March 27th, 1840.

Mr. Maxwell erected expensive and valuable stores and buildings on the lot in 1830 and 1831, and his net income from the lot since their completion, has been \$700 per year, over and above all charges and the interest on the cost of the land and the improvements.

On this state of facts, the master has in effect charged Mr. Maxwell with interest from May 6, 1830, at seven per cent. on the contract price with the complainant; which the defendant by his third exception insists is erroneous. And he contends that no interest was chargeable until the title of the lot was conveyed to him.

The principle is undoubtedly stated correctly by Mr. Senator

Spencer in his very able judgment in *Rensselaer Glass Factory v. Reid*, 5 Cowen, 587, 610, 611, where he says that the allowance of interest as an incident to a debt, is founded on the agreement of the parties; and that such agreement may be express or implied.

1. In this case there is no express agreement to pay interest. The writing is not signed by Maxwell, and contains no agreement on his part; but if he had signed it, it says nothing of interest.

2. An agreement to pay interest is implied, where there is a contract to pay the principal at a specific time, and the debtor makes default in such payment. Interest is then chargeable from the time when the money ought to have been paid, and it rests upon the ground of the default. (*Robinson v. Bland*, 2 Burr. 1086, per Lord Mansfield.)

In this case the money was to be paid, or secured to be paid, on the 1st of May, 1830; but there was no default in making the payment, because it was not to be paid at all, unless the complainant executed to the defendant a full and perfect conveyance of all his right and title to the lot sold, and no such conveyance was made or offered to the defendant.

If the defendant had signed the agreement of January 29, 1830, and it had contained an express promise to pay, he would not have been liable to a suit at law for the purchase money, unless the complainant had tendered him at least such a conveyance as that I have mentioned, or shown its preparation and his readiness to deliver it on receiving the price. Therefore no agreement or liability to pay interest can be inferred from Mr. Maxwell's default or omission to pay on the 1st of May, 1830, or at any time since until the conveyance was made to him.

3. The charge of interest is sustained mainly on the ground that Maxwell had the possession of the lot, and has received profits from it to more than the amount of the interest on the purchase money.

I do not think that the fact of his realizing more than the interest, is to have much weight, because that result is owing to the large expenditures made by him in improving the lot. As it stood when the complainant sold his interest in it, the rents and

profits were trifling in amount, and probably if let from year to year from thence till the decree, it would not have produced the half of one per cent. on the purchase money. The agreement to pay interest, if it is to be implied from the possession, must in this case, rest upon that consideration, irrespective of the value of the possession as compared with the amount of interest.

The well settled rule in England is, that from the time fixed for the completion of the contract, the purchaser is entitled to the profits of the estate, and will be compelled to pay interest for the price. This is the general rule, and Mr. Sugden says this holds good whether the purchaser does or does not take possession of the estate. (3 Sugd. on Vend. 97, Chapt. 16, sect. 1, § 1.)

The allowance of interest to the vendor, is however usually deemed consequent upon the purchaser's receiving, or being entitled to receive, the rents and profits of the estate, where there is no express agreement to pay interest.^(a)

In England where real estate is almost universally productive, and the rate of interest adopted by the courts of equity in cases of specific performance is only four per cent.; the operation of this general rule is equable and just.

In this country, a much larger proportion of the real estate sold, is entirely unproductive, and the rate of interest in the courts is that of the statute; in this state, seven per cent.

In the case of a vacant city lot, or of wild land, not bought for immediate improvement or cultivation, and where there is no express contract for interest; it would be repugnant to the moral sense to compel the purchaser to pay interest on the price, when through the default or negligence of the vendor, he had not received a conveyance, and thus had been for years prevented from disposing of the property. Nor would the fact that the buyer had taken all the possession that he could of such property, and had not kept the money by him all the time in order to pay it on receiving the title, affect the natural equity of the case. Yet by the modern English rule, he would be charged with interest under such circumstances.

(a) See *Adams v. Heathcote*, before Vice-Chancellor Sir L. Shadwell, March 26, 1846; 10 Lond. Jur. Rep. 301.

There are several exceptions to the general rule in England, and it has been still more departed from in our courts. Thus in the complicated case of *Hepburn v. Dunlop*, 1 Wheat. 179, 206, the vendor was indebted to the vendee, and the sale was made to pay the debt. This was in 1799, but a good title was not made to the vendee till 1809. The court held that the vendor must pay interest on the debt till that time; in other words, the purchaser paid no interest until he got a good title.

In *Birdsall v. Waldron*, 2 Edw. Ch. R. 315, the Vice-Chancellor decided that the seller, although in possession, would not be bound to pay his money into court before obtaining a title, where he went into possession with the understanding that he was not to pay it until he had a title. And the ground of the decision goes to the payment of interest also.

One of the exceptions made by Mr. Sugden is where the interest is more than the profits, and the delay was clearly made by the vendor, in which case the court gives the vendor no interest but leaves him in possession of the interim rents and profits. (3 Sugd. on Vend. 116, ch. 16, sect. 1, § 43.)

It is manifest, that if in such case the purchaser had gone into possession expecting a prompt completion of the sale, the equitable rule ought to be the same, where the delay is the fault of the seller.

I will refer to some other authorities hereafter, in reference to particular views of this case.

One ground of resisting interest here is, that Mr. Maxwell did not enter into possession under the contract of purchase. He was already in possession as the assignee of Bradshaw's lease, and at law, he was in the sole and exclusive possession.

There was no change in the character of his possession, consequent upon his purchase, until he received the title under the decree. If his right to the possession had been challenged in the intervening period, he would have sustained his right, not as a purchaser from the complainant, but as the assignee of Bradshaw's lease.

If it be said that in equity his possession was that of the complainant as well as himself, under the agreement of November, 1828, and that the character of the possession was changed by

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his assumption of exclusive ownership, and erecting buildings after the sale to him; I answer, that the proofs are consistent with the idea of the same joint equitable possession after the sale. Mr. Maxwell made similar improvements and erections on the other property embraced in the agreement of November, 1828. The only difference is, that he has kept a separate account of the latter, and brought that alone into the account against the complainant.

I do not perceive any reason in this case for straining a point against the defendant in order to charge him with interest; and I must hold that he did not go into possession under the contract in question.

The authorities are strong for exempting the purchaser from the payment of interest in such circumstances, where the delay is not imputable to him.

In *Blount v. Blount*, 3 Atk. 636, Lord Hardwicke declared, that as no possession was delivered to the purchaser by virtue of his purchase, and it was not his default at all that the conveyances had not been made, there was no pretence for making him pay interest. In that case the purchaser was in possession before making the purchase. Lord Hardwicke also says that it cannot be laid down in certain that from the time of possession, a purchaser shall always pay interest.

In *Paton v. Rogers*, 6 Madd. 256, the Vice-Chancellor said that a decree for interest from the time when the money was to be paid, was generally made; but not where the vendor has improperly delayed the execution of the contract.

In *Esdaile v. Stephenson*, 1 S. & S. 122, Sir John Leach, V. C. held that where there was no express stipulation to pay interest, and the delay in completing the contract was occasioned by the vendor; if the interest is much more in amount than the rents and profits, the court gives the vendor no interest, but leaves him in possession of the interim rents and profits.

He adhered to the same principle in *Monck v. Huskisson*, 4 Russell, 122, note *a*., and it was adopted by Lord Lyndhurst in *Jones v. Mudd*, 4 Russell, 118.(*a*)

(*a*) See *Winterbottom v. Ingham*, in the Queen's Bench, Trinity Term, 1845,

The case of *Birdsall v. Waldron*, before cited, is also an authority against the claim for interest on the ground of possession. The Vice-Chancellor there said, that if there had been delay in the performance without the default of the purchaser, he would not, although in possession, be obliged to pay the purchase money.

In *January v. Martin*, 1 Bibb's R. 586, the vendee went into possession under the contract. He tendered the purchase money, which was refused. He made large improvements on the premises. The vendor was not allowed interest.

In *Hart v. Brand*, 1 A. K. Marsh. Rep. 159, in the same court, it was held that one holding himself in readiness to pay, and the other refusing to perform, the latter is subjected to the loss of interest.

In the case before me, there was no change of possession consequent upon the contract to sell. Maxwell was not bound to pay the purchase money, until he received, at least, a conveyance of the complainant's right and interest in the lot. Therefore there was no default on his part, until such conveyance was made or tendered to him. He did not agree to pay interest at all. The law will not imply such an agreement, except from his default, or from the taking of possession being deemed an equivalent. And neither of those circumstances exist here.

It was urged that Maxwell knew perfectly well, and much better than the complainant did, that the title could not be completed by the 1st of May, 1830.

I cannot know from the case, how that fact is, nor whether one party or the other was aware of it. The contract of sale apparently contemplated two conveyances; one of the complainant's interest as it then stood, and the other of the legal title when obtained. There was nothing to prevent the complainant from transferring the former, on the 1st of May, 1830; and having omitted to execute such transfer, he was clearly in default on his part. He had no right to call upon the purchaser for the price,

10 London Jurist Rep. 4; against allowing interest, where a purchaser in possession was prevented from completing for the want of a good title. And see 10 London Jurist, Miscellany, 81.

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until that was done. Whether on that being done, he could have required any thing more than security for the payment of the principal, whenever the legal title should be procured, I need not determine.

Instead of performing so much of his contract, as was plainly within his power, on the 1st of May, 1830, he does not appear to have taken any measures towards performance during that year. On the contrary, on the 31st March, 1831, he repudiated the contract, denied its obligation, and disclaimed Mr. Maxwell as being the purchaser.

How long he maintained this position, does not distinctly appear. It was abandoned at all events, when this bill was filed, for he therein sets up the agreement for the sale, as binding upon Maxwell as well as himself.

It would be extraordinary upon such a state of facts, to allow to the vendor interest from the time when he ought to have completed his contract; he not only neglecting to perform, but denying his obligation to perform.

In *Hart v. Brand*, before cited, the court said that no proposition can be more clear than if the purchaser were really and *bona fide* prepared to make payment, and unequivocally intended it, and the vendor has evinced a determination not to perform the contract if possible, the latter is not entitled to interest.

I was referred to many authorities to the point that interest is payable from the time stipulated for the performance of the contract; and in some of them, this has been decreed in respect of possession *taken and continued under the contract*, where there has been great delay on the part of the vendor in completing the sale.

The latter, as I have endeavored to show, are not applicable; and as to all the cases, they depend very much upon their respective circumstances.

Thus, in *Fludyer v. Cocker*, 12 Ves. 25, the act of taking possession, was deemed an implied agreement to pay interest.

In *McKay v. Melvin*, 1 Iredell's Eq. R. 73, the purchaser went into possession, and the delay was occasioned by the death of the vendor.

In *Mayo v. Purcell*, 3 Munf. R. 243, there was an express

contract to pay interest after three months, and after going into possession of nearly all the premises, the purchaser resisted performance, because he did not get possession of the whole. The court decreed against him because he knew when he bought, that a part of the land was occupied adversely, and was aware of all the defects in the title.

In *Hundley v. Lyons*, 5 Munf. R. 342, there was a delay in making the deed on account of a misunderstanding between the parties, in relation to the terms of the sale. Chancellor Taylor directed interest from the actual execution of the deed, and profits to go to the purchaser from that time. The Court of Appeals for the cause above mentioned, decreed the profits to the purchaser from the time of the sale, and interest to be paid by him *from the end of a year* after the times when the respective instalments ought to have been paid by the purchaser. The purchase money was payable in instalments without interest.

In *Selden v. James*, 6 Rand. R. 465, the vendee went into possession, and assented to the recording of the deed made to him, and claimed under it. He delayed the payment of the principal, because of an adverse claim set up to the land, which turned out to be unfounded. He was decreed to pay interest.

In *Brockenbrough v. Blythe*, 3 Leigh, 619, there were two grounds upon which the charge of interest to the purchaser was sustained. The purchase money was ultimately payable to one of the defendants, who was not a party to the contract of sale, and only assented to convey, on receiving the money with interest.

Another ground was, that the purchasers went into possession and kept possession under the contract, and that it was at the option of Blythe, the covenantor, to receive the price and give them a conveyance with security for ultimately procuring the title, or to let them keep the price in their own hands, the title remaining as it was. One of the judges says, that where the vendee comes for specific performance, and he has had possession of both the land and the purchase money, he shall pay interest, even though the vendor has been in default unless the money has been idle and the vendor had notice of it. President Tucker says, p. 647, that the general rule is, that the purchaser who is let into possession must pay the interest for the purchase

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money, and the party claiming an exemption from it, must bring himself within some established exception.

Referring these decisions to the peculiar facts in each case, they do not conflict with my conclusion upon the question presented here.

The most that I feel warranted in doing for the complainant, is to allow him the value of the rents and profits which would have been derived from the lot, had it continued till 1840, in the same state in which it was when he sold his interest in it to Maxwell, and been rented from year to year.

The third exception to the master's report will therefore be allowed, and the account stated on the principle just mentioned.

2. The first exception is taken because the master refused to allow to Mr. Maxwell any thing for his superintendence and management of the joint property of himself and the complainant.

The decree under which the master proceeded, directs him to allow *no commissions* to Maxwell. The subject of compensation for services appears to have been discussed between these parties in 1833, when Mr. Ferris attempted to adjust their differences. The term, *commission*, is not limited to a compensation or per centage on the receipt, payment or transmission of money or its equivalent. It embraces the allowance for a great variety of services not connected with those duties. Thus a broker, who negotiates contracts relative to property, with the custody of which he has no concern, and for which he neither receives or makes the payment, obtains his commission on the transaction. In his case, as well as in most instances, the commission is usually ascertained by a per centage on the value of the property sold or amount of the business done. So of the *del credere* commission of a factor, a portion of it is for the guarantee of the solvency of the purchasers of the goods intrusted to him.

In 1 Bouvier's Law Dict. 281, commission is defined to be an allowance or compensation to an agent, factor, &c., or other person, who manages the affairs of others, for his services in performing the same. And see 1 McCulloch's Commercial Dict. 673, title, Factorage. 3 Chitty's Comm. Law, 221.

In Smith's Mercantile Law, 54, it is said that the remuneration to which an agent is entitled, is often called *commission*.

So Mr. Justice Story says, the compensation which belongs to the agent in consideration of the duties and responsibilities which he assumes, and the labor and services which he performs, is commonly called a commission. (Story on Agency, § 326.)

Such being the meaning of the term used, and the subject of these services having been agitated between the parties; I think the decree must be deemed to preclude the claim for compensation.

The first exception to the master's report must be overruled.

3. The remaining exception relates to the charge of seven per cent. interest against Mr. Maxwell, while he is allowed interest at the rate of six per cent. only.

The decree directs an account to be taken between these parties touching their respective receipts and *disbursements*, growing out of their operations under the agreement of November 14, 1828, and in taking the account, the master is to allow Maxwell interest at the rate of six per cent. on his *advances*, and he is to make all proper charges and allowances as between the parties.

In view of the language used, in the first instance *disbursements*, and in the next place, *advances*, it is probable that the direction of six per cent. was intended to apply to the advances, properly so called, which Maxwell stipulated to make in that agreement.

But there is another ground which is, in my mind, decisive of the point. I find no specific direction to the master to charge or allow any interest to either party, except to Maxwell on those advances. And under his general authority by the rule of the court, to charge and allow interest as shall be just and equitable, there is no apparent reason why if he thought it discreet to charge interest, he should charge to one party a higher rate of interest than the decree directed him to charge to the other.

The agreement between the parties would give to Maxwell seven per cent. on his advances. The decree restricts him to six per cent. without any expressed cause. It seems from the provision itself, that it was expected the interest account would all be on one side. On its turning out that interest should be

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charged against Maxwell in the latter stages of the account, it is surely inequitable that he should pay seven per cent. when in the earlier stages he is allowed six per cent. only.

The second exception to the report is therefore allowed.

As the account is to be stated anew, I will make no direction as to the costs in the cause. Neither party will recover costs on these exceptions or the hearing thereon.^(a)

^(a) On settling the decree, there was some diversity between the counsel as to its form.

THE ASSISTANT VICE-CHANCELLOR.—Upon the third exception, the interest must commence against Maxwell at the end of thirty days from the filing of the master's report, dated March 15, 1841. By the decree of March 27, 1840, the parties were to execute a conveyance to Maxwell after the master had reported on the accounts between the now litigants on the one side, and the estate of Stevenson on the other; upon the payment by Maxwell of one-half of the amount reported to be due.

The master's report of March 15, 1841, shows the result of that accounting, and that such payment had been made.

Thirty days were sufficient to confirm that report, and settle and execute the conveyance; and if not voluntarily executed the court would have speedily enforced it.

The title was equitably in Maxwell from the confirmation of the report; and from the time he might have had the legal title, I think he must pay interest.

In regard to the charge to Maxwell for the use of the lot, it will terminate when the interest commences on the purchase money.

The rent paid to the Stevenson estate, ought not to enter into this account for use and occupation. Those rents, as well as the price fixed in the lease for the purchase of the fee, were a part of the cost of the whole lot to the complainant and Maxwell, which they were equally liable to pay. The taxes and assessments on the half of the lot, should be credited to Maxwell to the extent that the half lot would have been subjected in its unimproved state.

As to the rate of interest, it is restricted by the original decree to six per cent. on Maxwell's advances. It becoming necessary to direct in this decree, the specific rate to be charged and allowed on the other items of the account, I have concluded that it should be the legal rate of interest. And that the term "*advances*," in the original decree, should be deemed to mean the advance which Maxwell was bound to make by the agreement of November 14, 1828, and should not include sums, which by that agreement, the parties were to pay equally in the first instance, but which were in fact wholly paid by Maxwell.

CURTIS and CURTIS v. ENGEL and others.

To make the separate estate of a married woman liable for her debt, where it is not charged upon the estate pursuant to the deed of settlement, it must be shown that the debt was contracted either for the benefit of her separate estate, or for her own benefit upon the credit of the same.

A general debt incurred by a married woman is not a charge upon her separate estate, nor is such estate chargeable upon any implied undertaking of hers.

A milliner on the eve of her marriage, transferred her furniture, stock in trade and things in action to a trustee for her sole and separate use, without providing for conducting the business in future. After her marriage, the stock was disposed of, and she went to Europe. It was after an interval, resumed by her, in her own name, her husband aiding in its management, but the trustee having no concern with it. *Held*, that the business was not conducted for the benefit of her separate estate, and the latter was not chargeable with the debts contracted therein. The business was in point of law the husband's, and the profits belonged to him.

And upon the evidence, it was held that the goods furnished to her and her husband in the millinery business, were not sold upon the credit of her separate estate.

Oct. 14, 15, 16, 17, 1844; January 10, 1845.

THE bill was filed by the complainants in behalf of themselves and all other creditors of Amanda A. Engel, formerly Mrs. A. A. Mott, against her with her husband, Adolph J. Engel, and James Donaldson and John Cook, who were respectively trustees of her separate estate; to charge upon the latter, certain debts incurred for supplies furnished to a millinery establishment which she conducted in the city of New York. Messrs. Donaldson and Cook were her trustees under the will of her grandmother. Mr. Cook was her trustee under a marriage settlement, executed on the eve of her marriage with Engel, by which she transferred the property she had accumulated in her trade. Under both trust dispositions, the property was settled to her sole and separate use, free from the control of any husband she might have. The will gave her no control of the capital of the estate, beyond a power of appointment, to take effect after her death. By the marriage settlement, she had an unlimited power of disposition of the entire estate, by a sealed instrument executed in the presence of two witnesses.

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The bill charged that the goods supplied by the complainants were sold on the sole credit of the separate estate of Mrs. Engel, and for its use and benefit.

The answer traversed these facts in positive terms ; and alleged that after Mrs. Engel's marriage with E., the business was not conducted on her account, or for her benefit, or that of her separate property.

Much testimony was taken, but it is not deemed necessary to state it at large, as its leading features are presented in the decision.

H. F. Clark, G. W. Morris, and Murray Hoffman, for the complainants.

J. Cook, in person, with whom was *D. Graham*, for the defendants.

THE ASSISTANT VICE-CHANCELLOR.—The complainants proceed against the separate estate of Mrs. Engel, without showing any charge or appointment made in pursuance of the deeds of settlement.

Therefore in order to sustain their suit, they must show, that the debt was contracted, either *for the benefit of her separate estate*, or for her own benefit *upon the credit of the separate estate*. (*North American Coal Company v. Dyett*, 7 Paige, 9 ; *S. C. on appeal*, 20 Wend. 570.)

Whatever may have been the expressions of judges on the subject, this is the utmost extent to which the doctrine has been carried by the decisions in this state. And in going to this extent, they differ more or less from the decisions in several other states ; although they conform to the law as settled in England by Lord Thurlow, and after being overturned by the Earl of Rosslyn and Lord Alvanley, as re-established since the accession of Lord Eldon to the wool-sack. (For the decisions in other states, see *Lancaster v. Dolan*, 1 Rawle, 231, 248 ; *Ewing v. Smith*, 3 De Saussure's Eq. R. 417, which virtually overruled *Carter v. Eveleigh*, 4 *ibid.* 19, decided before *Ewing v. Smith*, though reported subsequently ; *Magwood v. Johnston*, 1 Hill's

Ch. Rep. 228; *Clark v. Makenna*, Cheves's Eq. Rep. 163; *Morgan v. Elam*, 4 Yerger's R. 375.)

A *general debt* made by a married woman, having a separate estate, is not a charge upon that estate; and such estate is not chargeable upon any *implied* undertaking of hers. (2 Story's Eq. Jur. § 1398, 1400; *Gardner v. Gardner*, 7 Paige's R. 112; *Murray v. Barlee*, 4 Simons, 82; *Tullett v. Armstrong*, 4 Beav. 319; S. C. 5 Lond. Jur. R. 601.)

Aside from the questions as to the character of the trust property, have the complainants brought their claim within either of the grounds established in the case of *Mrs. Dyett*?

I. They insist that the goods in question were purchased for the benefit of *Mrs. Engel's* separate estate.

One simple mode of testing this proposition, is to ascertain whether the profits of the millinery establishment for which the goods were furnished, belonged to Engel as her husband, or to Mr. Cook as her trustee in the last settlement. The fact that her stock in trade at the time of the marriage was passed to the trustee, together with her furniture, debts due to her, and all her other property not already in the prior trust; does not aid in the inquiry, because the business in controversy was not conducted with or upon that stock. The parties went to Europe after their marriage, and the millinery concern of *Mrs. Mott* was at an end. The business was conducted in their absence, but there is no evidence that it was for her use further than the disposition of the stock assigned to the trustee.

After their return, it was continued, under *Mrs. Engel's* occasional charge; and at the establishment, was conducted in her name, as the custom appears to be among milliners who are married. In the spring of 1839, before the goods in question were sold, a store was opened in Broadway, with her name on the sign. She says that her husband hired it, and alone attended to the business there, and I find no proof to the contrary.

The trust deed is silent as to any future business to be carried on by *Mrs. Engel*. Nor, in my opinion, can any intention to conduct the business for her sole use, be implied from that instrument. There is no clause in it which is not entirely proper and pertinent to the plan of vesting all her then existing property in

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a trustee, to be managed by him for her benefit ; not by setting up a millinery store, but by the usual mode of executing a trust ; the converting the assets into securities or lands producing an income. The words, *profits, gains, income, and increase*, are applied indiscriminately to the real estate, as well as to the personalty transferred.

The provision that the trustee might make use of their joint names in suits for the recovery of sums due, or to grow due to her on her separate estate, was appropriate in reference to the debts and things in action standing in her name before the marriage, and transferred to Cook by the trust deed.

There are other clauses which conflict with the idea that any active business or trade was to be carried on under the trust, or with the trust property.

Thus, after requiring all of the property which should at any time consist in money, to be invested on securities or real estate, &c., the deed provides that "*such estates and all gains and the increase thereof, shall from time to time be accounted for by Cook,*" to and with Mrs. Engel. And again, all the securities and *estates or properties*, in which the separate estate should be thereafter invested, were to be taken and made *in the name of Mr. Cook*, his executors, administrators or assigns.

In short, I can only gather from the instrument, the intent to vest in the trustee all Mrs. Engel's property, for her separate use, to be managed subject to her appointment and direction, as such trusts usually are. I can perceive no indications of the design which the complainants seek to deduce from its provisions, to secure to Mrs. Engel as her separate estate, the fruits of her future industry, taste and enterprise, in the department of business in which she was then engaged, provided she chose to continue it, or to resume it at some future time. The stock in trade was mentioned in the trust deed, for the same reason precisely that her furniture was ; because a part of her property existed in that form.

If there had been any intention to secure to her sole use, her future earnings and acquisitions, a suitable provision would have been made in the deed. This is frequently done to provide for after acquired property by gift or inheritance.

As the case stands, I do not think that Mr. Cook could have claimed as trustee, any interest in the business transacted in either of the stores, when the complainants sold their goods; or could have maintained a suit upon any debt contracted at either of the stores, for millinery sold by Mrs. Engel or her husband. If the business were really that of her separate estate, the legal title of all such debts would have been in Cook, and he could have collected them in his own name.

In the case of Mrs. Dyett, 7 Paige's R. 9, the debt was for coal used in a manufactory which was a part of her separate estate, and which was at the time of the sale conducted for her separate use and benefit.

Here the millinery business formed no part of the separate estate; and it was not carried on for the separate use of Mrs. Engel, according to my view of the case.

II. Were the goods of the complainants furnished for the benefit of Mrs. Engel and upon the credit of her separate estate? If the profits of the business belonged to Engel, which is my conclusion as before stated, the goods were not furnished for Mrs. Engel's benefit; and this is an answer to the inquiry.

But I will proceed a step farther. Suppose the complainants had sued Engel at law for their debt, could he have defended himself on the ground that the goods were sold to his wife, for her separate use and upon the sole credit of her separate estate? Undoubtedly not. If he had referred to the sign, exhibiting his wife's name at the door, and proved that she managed the whole business, and in her own name, and that the complainants had charged the goods to her in their books, and knew she had property before the marriage and relied on that instead of relying on him, it would have availed nothing. The answer to it all would be, that milliners always do business in their own names; their husbands names never appear either in purchases or sales; you, Mr. Engel, knew of your wife's buying these goods and conducting this business, and you did not dissent or stop it, therefore the law charges you as the party in the transaction and the purchaser of the goods.

The complainant's case as proved, is entirely consistent with the position that the business was in truth that of Engel, in vir-

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tue of his marital rights, and that they believed the property on which they relied, had vested in him by the marriage. I do not imagine that the complainants, if they had been convinced that Mrs. Engel had married without any settlement, would have sold their goods with any less hesitation, or in any different manner, to these parties. It was perfectly natural for Mrs. Engel to make all the purchases, if the business were her husband's; because she was familiar with it, and he was not. It is more surprising that he ever attempted to purchase goods for the stores, than it would have been if she had bought them all.

Then as to the charge to Mrs. Engel in the complainant's books. That is no evidence against her, because she knew nothing about their bookkeeping. Their acts which came to her knowledge, or were likely to be known to her, indicated that they looked upon her husband as the debtor. Their receipts were given to him, not as received from him on her account, but as on his own account; and the receipt of October 23d, 1839, is in his name in full for bills to May inclusive.

The bill of the goods in question, produced before the examiner, appears to have been originally made out to "*Mr. A. Engel*" and subsequently altered to "*Mrs. A. A. Engel.*" (Not that I believe the alteration was made for any sinister purpose.)

The complainants have not proved to my satisfaction that they sold the goods upon the credit of Mrs. Engel's property, or relied upon it, *as being her separate property*, or her property exclusive of her husband. The most that they show, is that they knew her as having property before her marriage, and they relied upon that property after her marriage. Unless they knew of the settlements, (and there is no proof that they did,) the legal inference is, that they relied upon it as the property of the husband, so far as by law marriage entitles a husband to an interest in property of the wife; and the testimony, upon the whole, corroborates that inference.

The result is, that the complainants do not, upon either ground, bring their case within the principles on which this court is enabled to reach the separate estates of married women.

There is no power in the court to compel Mrs. Engel to make an appointment for the payment of this debt. The case of *Hallett*

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v, *Thompson*, 5 Paige, 586, cited for that proposition, is not applicable to a married woman.

The bill must be dismissed with costs.

BELLINGER v. SHAFER and others.

The provision in the revised statutes, that when the purposes for which an express trust shall have been created, shall have ceased, the estate of the trustees shall also cease; applies to trusts created before those statutes took effect.

So of the provision that persons who by any grant are entitled to the actual possession and the receipt of the rents and profits of lands, in law or in equity, shall be deemed to have a legal estate therein commensurate with their beneficial interest, where no power of disposition or management over the same remains in trustees.

S. and his wife conveyed a farm to trustees, *habendum* to them and their heirs and assigns, for the support, maintenance and education of three grandsons and four granddaughters of the grantors, until the latter respectively arrived at full age, unless they were sooner married, on which the use and objects of the trust as to them should cease; and to the further use and behoof in fee simple to the three grandsons; with a power of sale to the trustees in the meantime.

Held, that the trust continued for the benefit of the whole seven, until all the granddaughters were married or of full age; upon which event the interest of the latter ceased, and the objects of the trust ceased also, together with the power conferred on the trustees; and the three grandsons thereupon became seized of an absolute legal estate in fee.

The father of the beneficiaries, with the trustees consent, made permanent improvements on the farm, while their tenant; the trust containing no authority for the same, *held* that no allowance could be made for such improvements, as against the beneficiaries and those claiming under them.

It was also held, that the trustees had no lien upon the farm after their estate in it ceased, for any unpaid commissions or charges.

Albany, Dec. 20, 1844; January 10, 1845.(a)

THE bill in this cause was filed to foreclose a mortgage executed by Jerome Shafer to the complainant, upon an equal undivided third part of a farm of one hundred and sixty-seven acres,

(a) A special term was held by the assistant vice-chancellor, at the capitol in the city of Albany, on the third Monday of December, 1844.

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situate in the town of Cobleskill in the county of Schoharie, dated May 27th, 1839.

The defendants, besides Shafer, were the trustees named in a deed of the whole farm, executed by Peter Shafer and Angelica his wife, on the 16th day of February, 1829. By that deed, the grantors in consideration of natural love and affection for the seven infant children of their son Jacob, as also for the better maintenance, support and livelihood of the seven children, conveyed the farm to Adam V. Shafer, Peter Shafer, Junior, and George Spraker, and to their heirs and assigns. The *habendum* clause was in these words :

"To have and to hold the said lot, piece or parcel of land, hereby granted and conveyed, or mentioned or intended so to be, with their and every of their appurtenances, unto the said Adam V. Shafer, Peter Shafer, Junior, George Spraker, their heirs and assigns, for the support, maintenance and education of them the said Levina Shafer, Jane Ann Shafer, Almira Shafer, Caroline Shafer, Jerome Shafer, Jethro Shafer, and James Shafer, until they the said daughters respectively arrive to the age of twenty-one years, unless they be sooner married, upon which contingency happening, the use and objects of this deed of trust, as to them, shall cease ; and to the further use and behoof in fee simple, to the said Jerome Shafer, Jethro Shafer, and James Shafer, their heirs and assigns for ever ; and to be conveyed, used, applied, or disposed of, in the whole, or a part thereof, from time to time, as the said trustees, in their discretion, may deem expedient and proper ; but for no other use, trust, intent or purpose whatsoever."

After which followed a covenant of warranty.

The trustees executed the trust, and during a great portion of the time, permitted the father of the beneficiaries to occupy the farm and apply the proceeds to their support. He made permanent improvements on the farm, by the erection of buildings and otherwise, with the trustees assent.

The youngest of the granddaughters became twenty-one years of age in 1838.

The defendants put in an answer, insisting that Jerome Shafer, at the time of the execution of the bond and mortgage, had

no estate, right, title or interest in the farm ; but that the same remained vested in the trustees, upon a continuing and existing trust. They also insisted that the farm was liable for the additions so made thereon by the father of the beneficiaries ; and that Jerome Shafer's interest in the farm, if he had any, was subject in equity to the support of his parents, (who were destitute,) in respect of such additions.

At the hearing, they alleged that the consideration of the bond and mortgage was illegal and void. Also that the trustees had a lien upon the farm for their unpaid charges and commissions.

The cause was heard on pleadings and proofs.

H. Hamilton, for the complainant.

H. Loucks, for the defendants.

THE ASSISTANT VICE-CHANCELLOR.—The trust in the deed executed by Peter Shafer to Spraker and others, was undoubtedly valid.

I am equally clear in my conclusion as to its effect. The trustees were to hold the land for the support, maintenance and education of the seven grandchildren, *until* the four granddaughters respectively arrived to the age of twenty-one years or should be married ; and *upon that event*, to the further use and behoof in fee simple of the three grandsons.

The object of the trust was, to devote the farm to the support of the seven children until all the daughters were married or had become of mature age ; and after that, the sons were to have the farm in fee. The deed expressly declares, that when the daughters were thus disposed of, the use and objects of the trust as to them, should cease ; and the powers conferred upon the trustees are limited to the use, intent and purpose of the deed.

When an estate is limited to a person in fee simple, as this estate was, after the granddaughters became of age ; there can be no further occasion for a trustee to manage it. Nor can there be a trustee, where the beneficiary has an absolute estate in fee simple. The objects of the trust, both express and inferrible, terminated with the interest of the granddaughters. The power

Bellinger v. Shafer.

of management and disposition given to the trustees, was for the objects and purposes of the trust, and only commensurate with them. The power therefore ceased to exist, when those objects were accomplished.(a)

The revised statutes provide that when the purposes for which an express trust shall have been created, shall have ceased, the estate of the trustees shall also cease. (1 R. S. 730, § 67.) They also declare, that every person who by virtue of any grant, is entitled to the actual possession of lands and the receipt of the rents and profits thereof in law or in equity, shall be deemed to have a legal estate therein, of the same quality and duration, as his beneficial interest. Trusts, in which the trustees have an actual power of disposition or management remaining, were excepted. (Ibid. 727, § 47, 48.)

These sections apply to trusts created before the revised statutes took effect. (*In the matter of De Kay*, 4 Paige, 403; and see *Eckford v. De Kay*, 8 ibid. 89, 94; S. C., *on appeal*, 26 Wend. 29.)

According to the statute and these authorities, Jerome Shafer became seised of an absolute legal estate in fee in one undivided third of the farm, when his youngest sister became of age in 1838.

It does not affect the argument that he was then under age. Any actual control of the land would necessarily be exercised by his guardian during his minority, and he could no more dispose of it then, than he could have done previous to 1838, while the estate of the trustees continued.

The complainant's mortgage, executed after he became of full age, is therefore a valid lien on Jerome Shafer's third part of the farm.

I perceive nothing in the answer which impeaches the consideration of the mortgage. The testimony produced for that object must hence be disregarded.

(a) See to this effect, *Adams v. Adams*, in the Queen's Bench, January 31 1845; 9 London Jurist Rep. 300; and see also, *Barker v. Greenwood*, 4 Mees. & Welsby, 421, 429.

Nor can I make any provision for commissions or charges which may be due to the trustees. Their whole estate in the land terminated when the youngest granddaughter became of full age. They had no further right to control or possess it, and they can have no lien upon it for such charges.

The same difficulty exists in respect of the improvements and erections made by the father of Jerome Shafer, with the trustees consent. The trust authorized nothing of the kind. If the trustees had themselves made such expenditures, and in entire good faith, they could not have compelled the grandsons to pay for them on their receiving the estate. (*Green v. Winter*, 1 J. C. R. 26, 39.) And their consent did not clothe the father with any better right than their own. This may be a great hardship upon the father, but it is one which cannot be avoided, according to well settled principles which govern this court as well as courts of law. One man cannot become a creditor of another, without the express or implied assent of the latter. Jerome Shafer, if he had been so disposed, might have given to his father a valid lien for the value of the improvements which the father made. No such lien was given, and the complainant's mortgage is the only lien upon the premises which this court can recognize.

Jerome Shafer's liability to support his parents, is not a lien either at law or in equity.

The complainant is entitled to the usual decree for foreclosure and sale, and the payment of his debt and costs; and a decree for any deficiency, against the mortgagor.

Best v. Stow.

BEST v. STOW.

To induce equity to decree the specific performance of an agreement, it must be free from fraud, surprise or misrepresentation.

A misrepresentation made by the vendor in a matter of substance, affecting the value of the estate sold, is a good defence to a suit for specific performance, although the vendor, as well as the vendee, was ignorant of its untruth.

This was held of an erroneous statement that land in a distant state, was situated in a particular county, in which the purchaser desired to buy.

The *defendant*, in a suit for specific performance, may show in his defence, by parol evidence, that the written contract relied upon, does not correctly and truly express the agreement of the parties, but that there is some material omission, insertion or variation, through mistake, surprise or fraud.

Albany, Dec. 17, 18, 1844; January 18, 1845.

This was a suit for the specific performance of an agreement, dated December 1st, 1842; by which the defendant contracted to exchange a house and lot in Columbia county, for lands of the complainant situated in the state of Michigan. The agreement described the latter as "being in the district of lands subject to sale at Ionia, Michigan."

The defence was, that the agreement actually made between the parties, was for lands lying in the county of Ionia in the state of Michigan, and that by mistake, the scrivener who drew up the contract, described them as lands in the *Ionia Land District*, which embraced several counties. Also that the complainant represented his lands in question, as being in Ionia county, in which county the defendant desired to purchase; whereas one hundred and sixty acres of the lands were in the county of Ingham, and the residue in the county of Gratiot, both being inferior and less valuable regions than Ionia county. The answer charged that this misrepresentation was fraudulent.

There was some conflicting testimony as to the terms of the contract between the parties, and its reduction to writing; but it is deemed unnecessary to state any thing more than the conclusions of the court; which will be found in the opinion delivered.

K. Miller, for the complainant.

R. McClellan, for the defendant.

THE ASSISTANT VICE-CHANCELLOR.—I have no doubt upon the testimony, that the complainant represented to the defendant that the lands which he proposed to convey to the latter, were situated in Ionia county, Michigan. And I am satisfied that the agreement between the parties which they employed Mr. Mesick to draw up, was for the exchange of lands in Ionia county, for the defendant's lands in this state.

I do not believe that there was any fraudulent misrepresentation on the part of the complainant; and when the deeds were left with Mesick to enable him to draw the agreement, probably neither the parties, or Mesick, were aware that Ionia Land District and Ionia county, were not one and the same thing. The same mutual ignorance probably prevailed when the contract was signed.

The question is, whether the defendant shall be compelled specifically to perform an agreement thus made.

In the absence of fraud, a preliminary objection is made, that the answer does not allege any surprise or mistake.

It is true, the answer does not make use of those words. It however states the complainant's representation that the lands were in the county of Ionia, that the defendant bargained for such lands, and that Mr. Mesick was to have drawn up the contract accordingly. The answer then shows the error in the contract, and that the lands are in the counties of Ingham and Gratiot.

This suffices to present the issues of mistake and misrepresentation.

In order to induce this court to decree a specific performance, the contract must be free from fraud, misrepresentation or surprise. (*Seymour v. Delancey*, 3 Cowen, 445.)

The party defending against a suit for such performance, need not prove that the misrepresentation was wilful or fraudulent. But it must be in some matter of substance, which affects the value of the estate sold, and which was unknown to the purchaser.

The locality of the land is usually one of the most important considerations with a purchaser. This fact constitutes one of

the reasons assigned for the interposition of a court of equity. A compensation in damages will not in such cases afford adequate relief; for the peculiar locality, soil, vicinage, advantage of markets, and the like conveniences of an estate contracted for, cannot be replaced by other land of equal value.

In this case, it is clear that the defendant intended to contract for lands in the county of Ionia, and not elsewhere. He contracted on the representation that the lands were in that county. It turns out, that the lands are not in Ionia county, and it would be inequitable to compel him to receive them.

There is another principle upon which this defence may be sustained.

The *defendant*, in answer to a bill for a specific performance, may prove by parol evidence, that the written instrument sought to be enforced against him, does not correctly and truly express the agreement of the parties, but that through fraud, surprise or mistake, there is some material omission, insertion or variation, contrary to the intention or understanding of the parties. (2 Story's Eq. § 769, 770, and note; 1 Sugd. on Vend. Ch. 3, § 8, p. 224, &c., 6th Am. ed.; 1 Phill. Ev. 4 Am. ed. 569. And see *The Marquis Townshend v. Stangroom*, 6 Ves. 328; *Ramsbottom v. Gosden*, 1 V. & B. 165; *Gillespie v. Moon*, 2 J. C. R. 585; *Rich v. Jackson*, 4 Bro. C. C. 514; S. C., 6 Ves. 334, note c.)

I will mention a few of the cases in which this principle has been applied.

In *Joynes v. Stathan*, 3 Atk. 388, the defendant was permitted to prove that the agreement between the parties was that the rent was to be paid *clear of taxes*; which clause was omitted in the agreement as written and signed.

Clark v. Grant, 14 Ves. 519, 524, was a case where performance was refused upon a parol variation of the written contract.

In *Winch v. Winchester*, 1 V. & B. 375, parol evidence of the auctioneer, warranting the quality of land, was received in opposition to a specific performance of a contract which expressed the quantity to be forty-one acres, *more or less*.

In *Clainan v. Cook*, 1 Sch. & Lef. 22, 38, 39, Lord Redesdale fully approved and admirably vindicated the principle, as appli-

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cable to defendants resisting specific performance; but he refused to apply it in favor of the complainant who sought to enforce performance.

And Sir William Grant, Master of the Rolls, pursued the same course in *Woolam v. Hearne*, 7 Ves. 211, at the same time indicating the established rule in behalf of defendants.

I think the defendant here is justified in saying that the instrument which he signed, did not contain the agreement which he entered into, and that he is not bound to perform it.

The bill must therefore be dismissed, but without costs. The defendant has failed in showing the fraud which he set up in his answer, and succeeds on a ground which is not inconsistent with good faith on the part of the complainant in making the contract.

Decree accordingly.

MASTERS and others v. THE ROSSIE LEAD MINING COMPANY
and others.

Where the charter of a corporation permits its creditors to sue the stockholders "in any court having cognizance thereof," a suit may be commenced in equity.

Creditors who filed a bill against such a corporation, and thereby obtained a discovery of the names of the stockholders, then exhibited a supplemental bill against the stockholders. *Held*, that the proceeding was proper, and that creditors might sue the corporation and the stockholders conjointly in equity.

A creditor of a corporation may proceed against it by bill, as well as by petition, under the thirty-sixth section of the revised statutes relative to proceedings against corporations in equity.

The usual judgment creditor's bill, is a sufficient form of proceeding under that section; although the party filing it will not thereby obtain any preference over other creditors.

The charter made the stockholders jointly and severally liable for the debts of the corporation, on the return of an execution at law unsatisfied against the latter.

Held, that creditors might enforce the liability without awaiting the issue of a decree.

Where in such a case several stockholders were proceeded against in equity, the decree subjected them all to the debt; with leave to apply to enforce contribution among themselves.

Officers of a corporation who are made parties to a bill for the purposes of discovery, are in respect of their costs deemed a part of the corporation. *Semble*.

But when the discovery thereby obtained is used to charge such officers personally in a supplementary proceeding, they will be allowed the costs of their answer.

Albany, Dec. 17, 1844; January 20, 1845.

Masters v. Rossie Lead Mining Company.

The complainants in October, 1840, recovered a judgment in the Supreme Court, against The Rossie Lead Mining Company, a corporation created by an act of the legislature in 1837, for powder sold to the company at various dates in the year 1839. Upon this judgment an execution was issued to the county of St. Lawrence, which was returned unsatisfied.

On the 5th of May, 1841, they exhibited their bill in this court, against the corporation and several of its officers, in the usual form of a judgment creditor's bill founded on the return of an execution; asking for a discovery of the stockholders, and that they should pay the debt, if it were not collected from the corporation.

The corporation put in an answer, as did Mr. Judson who was its secretary, in which the names of a large number of stockholders were given; amongst whom was Judson himself.

In July, 1841, the complainants filed a supplemental bill against the stockholders, setting forth the original debt, the judgment and execution, and the original bill, and charging that the corporation had no property or effects; and praying that the stockholders should be decreed to pay the judgment and costs.

Several of the defendants put in separate answers. Some of them denied that they were stockholders. It was also alleged by some of the answers, that the complainants remedy was at law, that the corporation and the stockholders could not be joined as defendants in the same suit, and that the supplemental bill was multifarious.

The cause came to a hearing on the pleadings and proofs, as to the defendants who answered, and on the bill taken as confessed against the other defendants.

S. Stevens, for the complainants.

M. T. Reynolds, for the defendant Taylor.

A. Taber, for McCullough, Raynor and others.

J. Edwards, for D. C. Judson.

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THE ASSISTANT VICE-CHANCELLOR.—The original bill was correctly filed against the corporation. (2 R. S. 463, § 36.) The proceeding under that section may be by bill, as well as by petition.

The case of *Morgan v. The New York and Albany Rail Road Company*, before the Chancellor in May, 1843, referred to by the defendants,^(a) decided that creditors of an insolvent corporation would not obtain a preference by filing the usual judgment creditor's bill; not that such a bill could not be filed. On the contrary, that case shows that the ordinary judgment creditor's bill is a sufficient proceeding under the 36th section of the statute relative to proceedings against corporations in equity.

I have no doubt that the liability of the stockholders of The Rossie Lead Mining Company, to the payment of the debts of that corporation, may be enforced in equity. The charter permits creditors to sue them "in any court having cognizance thereof;" and the revised statutes expressly give cognizance of such suits, to this court. (2 R. S. 464, 465, § 43, 44, 45.)

Another objection is urged, that the supplemental bill cannot be maintained to enforce this liability. Also that it cannot be enforced conjointly with a suit against the corporation, because the remedy against the latter must be exhausted, before going against the stockholders.

The reason assigned, holds good in respect of the remedy at law only, which was exhausted before filing the original bill. See section 10, of the charter of this corporation. (Laws of 1837, ch. 396.) To dispose of the objection last mentioned, the 46th section of the article of the revised statutes relative to these proceedings, pre-supposes that the corporation is to be joined with the stockholders, officers, &c., in a suit under section 45th. The receivers there authorized, are receivers of the corporation, not of the individual parties sought to be charged.

In the case of *Mann, Receiver of the Catskill and Canajoharie Rail Road Company v. Pentz*, (January 13th, 1845.)^(a)

(a) Now reported, 10 Paige, 290.

(b) Reported, ante page 257.

I held that the 42d and subsequent sections of the article of the revised statutes relative to these proceedings against corporations, applied to the suits instituted under the 36th section of that article, as well as to those under section 39th.

If I were right in that conclusion, there is no difficulty here, because the 43d section enables the creditor to make the stockholders parties to the bill, either on filing it, or subsequently. And where the stockholders were only ascertained by the bill itself, as was the case here, they can properly be made parties by a supplemental bill alone. An amendment of the original bill, for that purpose, would be incongruous.

Assuming however, that the 43d section is not applicable; the same reason for a supplemental bill exists in a proceeding under section 45th. The creditor having exhausted his legal remedy, came into this court to compel payment of his debt. He sued the corporation in the first instance, and apprehending that remedy would be ineffectual, he sought a discovery of the parties who by the statute, were personally liable for his debt. These parties were liable, irrespective of the result of his suit against the corporation in this court. Having ascertained who they were, I think it was competent for him to enforce that liability by a supplemental bill. The proceeding adds parties who are primarily liable to the demand shown by the original bill, and who were unknown when it was filed. (Lube's Eq. Pl. by Wheeler, 136, note 1, chap. 16, § 1.)

This course was pursued in *Judson v. The Rossie Galena Company*, 9 Paige, 598, and received the tacit approbation of the court in that case.

I do not think that the remedy under this charter, against the stockholders, is to await the result of the decree mentioned in sections 48, 49 and 50, of the article before cited. The liability is several, as well as joint; is for the whole of the debts, and not restricted to the amount of stock owned by the party; and it is absolute, upon the return of an execution at law against the corporation, unsatisfied.

The defendant, Judson, claims the costs of his answer to the original bill. He was made a party as the secretary of the corporation, in aid of the discovery sought, and it appears by his

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answer that he is a stockholder also, against whom the complainants are entitled to a decree for their debt and costs. The latter circumstance is not so material to the point, inasmuch as there are many other parties liable with him.

The jurisdiction is well settled, to make the officers of a corporation parties in this court for the purposes of discovery; and it is my impression that in such cases, they are deemed a part of the corporation in respect of their costs. (See *Dummer v. The Corporation of Chippenham*, 14 Ves. 245; *Glascott v. The Governor and Company of the Copper Miners of England*, 5 Lond. Jur. R. 264; *McIntyre v. Trustees of Union College*, 6 Paige, 239; *Many v. The Beekman Iron Company*, 9 Paige, 188.)

In this case, the complainants did not apply to Judson, before filing their bill; and for this cause, as well as the fact that the discovery is a part of the complainant's proceeding to enforce his debt, I will direct them to pay the costs of Judson's answer, and include them in their general bill against the defendants.

There is a small fund in the hands of the receiver, to which all the creditors of the corporation are equally entitled. The complainants can receive only their proportion of this fund.

They are entitled to a decree against the defendants for their debt (exclusive of the costs at law,) with interest and the costs of this suit. There will be a reference to ascertain what portion of the fund in the hands of the receiver, equitably belongs to the complainants, and they may pay their costs at law out of such portion. The residue of their debt, interest and costs, to be specified in the master's report, may be collected by execution against all of the defendants who were served with process.

And the decree may provide for an application by the defendants to enforce contribution among themselves.

Mohawk and Hudson R. R. Co. v. Costigan.

THE MOHAWK AND HUDSON RAIL ROAD COMPANY v. COSTIGAN and others.

COSTIGAN v. THE MOHAWK AND HUDSON R. R. Co.

Where an agent purchases land in his own name upon the request and for the benefit of his principal, pays part of the consideration, and gives his mortgage for the residue, with a bond in which his constituent joins; the agent is a surety for his constituent in respect of such bond; and equity will decree that he be paid his advance and indemnified against the bond and mortgage, on his conveying the title to the principal.

It is competent to prove by parol evidence that in such a purchase, the party receiving the deed and executing the mortgage, is a surety in respect of the latter.

Albany, Dec. 19, 20, 1844; January 20, 1845.

THESE were original and cross suits, and were heard on pleadings and proofs. The facts as ascertained by the decision, were these. Costigan was the superintendent and principal outdoor agent of the Mohawk and Hudson Rail Road Company. On the 26th of February, 1841, the company having determined to remove their passenger depot in Albany from State-street to the lower end of South Market-street, took a lease from James Requa for part of a block of ground on that street, bounded by the Hudson River, with a stipulation that they might buy the whole block in fee at \$20,000, at any time during the term. On the 24th of July, 1841, the board of directors of the company, resolved to avail themselves of the right to purchase, and directed the superintendent to sell off that part of the block not required for their immediate use, for \$7000. Requa having died in the mean time, an order was made by the Chancellor for the conveyance of the premises by his infant heirs, and directing a mortgage for \$14,000 of the purchase money to be executed to the register of the court for their benefit. The remainder was to be paid in cash.

The directors then proposed to Costigan to take the title in his name, urging as a reason, the inexpediency of the company's appearing a debtor on mortgage while applying for a loan then in contemplation. And it was finally agreed by Costigan, that he

would receive an assignment of the Requa lease, take a conveyance of the title to the block in his own name, pay to the Requa's the sum payable in cash, and give his mortgage on the block to the register for the \$14,000 together with a bond executed by himself and by the company, the latter appearing therein as surety; upon the agreement of the directors that he was to be a mere agent of the company in the transaction, that his advance should be repaid with interest, that the company was to pay off the bond and mortgage and have the entire control of the premises, and that Costigan would convey the same to them whenever requested.

The lease was assigned, the conveyance made to Costigan, and a bond and mortgage executed accordingly. The arrangement between Costigan and the directors was established by the testimony of two of the directors. There was no written agreement to that effect between the parties; though Costigan in September, 1842, executed a sealed instrument reciting that the premises were conveyed to him for the benefit of the company, and agreeing to convey the same to them, on being paid his advance and the cost of the improvements thereon.

On the 28th of June, 1843, on a change in the direction of the company, Costigan was dismissed from his post as superintendent, and soon after, the company resolved to abandon the premises as their depot, and bring their road into the northern part of the city of Albany, so as to avoid the use of an inclined plane with stationary power. They however continued to use the block in question until after the cross bill was filed.

On the 16th of October, 1843, the company filed their bill against the register of the court, and Costigan, together with Requa's widow and heirs; charging that the company were a surety for Costigan, in the bond executed with the mortgage, and that the register had sued the company at law on the bond for the non-payment of six months interest; and praying that the mortgaged premises might be decreed to be sold for the payment of the interest in arrear and for the future payments from time to time, and that the register might exhaust his remedy on the bond against Costigan, before resorting to the company for the debt.

On the 5th of January, 1844, Costigan filed his cross bill against the company, insisting that they were primarily liable for

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the payment of the debt, and he was their surety. He prayed for an account and payment of the balance due to him; for indemnity against the bond and mortgage; and for a declaration of his rights accordingly.

J. V. L. Pruyn and M. T. Reynolds, for The Mohawk and Hudson R. R. Co.

J. Rhoades and S. Stevens, for Costigan.

THE ASSISTANT VICE-CHANCELLOR.—I have no doubt upon the proofs in this case, that Costigan took the conveyance of the Requa block as the agent and for the benefit of the company; advanced the \$6000 paid down, at their request; and executed the bond in question as the surety of the company.

There are some acts of Costigan which are inconsistent with this view of the case; but they are such as are readily explained by his situation as superintendent of the rail road, having the whole active supervision, and making a large share of the disbursements; and by the loose manner in which the whole affair was conducted from the outset.

The payments to him for rent of the depot, were all receipted by him for the Requa estate, or in respect of their contract, and may be referred to the circumstance that he paid the interest to the Requa estate, and was entitled to interest on his advance, in all \$1400 per annum; for which purpose the rents were properly applicable.

Costigan's account current made out immediately upon his removal from his office of superintendent, and delivered with his tender of the deeds, before he knew or heard of any intended change of the depot; is of itself a strong circumstance to rebut the inference from his adding the dining room without express authority from the board, and his omission previously to render an account of those disbursements, and of the rents received from that source.

On the other hand, the proof is positive, that he took the deed, advanced the money, and gave the mortgage, as the agent and trustee of the company, and that he was reluctant to have his name thus used. This was after the propositions were made by

Freeman to rent a part of the purchase for a tavern, and to enlarge the buildings, and it is therefore manifest that the real cause for his entering into the transaction, was his dependent situation as an officer of the company, holding a desirable post, and removable at pleasure. He could not refuse to do what was thus urged upon him by the directors.

The propriety of the directors course, or of their reasons for it, is nothing to the purpose. It was not illegal, because the company could not buy the depot, without buying the whole block of ground. The reasons themselves are proved by two of the directors; and it is not for the company now to say that they were false or frivolous.

Unless the conveyance was for the company's benefit, they had no right to use the depot after the 4th of September, 1841. They had assigned the Requa lease and contract to Costigan and he had received the title in fee.

Yet they occupied the depot without any lease, written or verbal, from that time, as they had done before; and not only that, but they continued to occupy it after they had dismissed Costigan from their employ, and after this controversy had commenced. The agreement which the company took from Costigan in September, 1842, is perfectly consistent with his present allegations. It recites that he purchased the whole premises for their benefit, and in effect, provides for reimbursing what he has paid. Although it is silent as to an interest account and the rents and profits; the recital, together with his position as their superintendent, would require such an account as a matter of course.

It was contended by the counsel for the rail road company, that the transaction was illegal, if it was understood by the parties, that the corporation was to be the principal debtor, and not the surety in the bond.

This certainly was not such a resulting trust as is described in the 51st section of the article of the revised statutes relative to uses and trusts; for no consideration has been paid by the corporation.

In my judgment, it is not necessary to decide, whether it was a trust resulting by implication of law, by reason of Costigan's agency and fiduciary relation towards the company. That ques-

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tion became unimportant to them when they obtained his agreement in September, 1842, and it never was important to him.

So far as the bond is concerned, it is and always was a question of principal and surety. Taking the deed, mortgage and bond, without extrinsic evidence, it would appear that Costigan was the principal debtor. And it would have been precisely the same, if Costigan had given his note, indorsed by the company, to Mrs. Requa, for the \$6000, or had accepted the company's bill of exchange in her favor, for that sum. In this case, as well as in the cases supposed, the fact that Costigan was surety, and the corporation the principal, could as between him and the corporation, be proved by parol evidence. This is now too familiar to require a reference to authority. If therefore, in this instance, there was any defect in respect of the company's rights, because the statute will not recognize such a trust in real estate as that which they attempted; the defect did not reach Costigan's right to recover his money advanced and to charge them as the principal debtor, if compelled to pay any thing on the bond which he signed with them. There is no statute which forbids the proof by parol of demands for money lent or money paid.

There must be a decree declaring the rights of the parties accordingly, and dismissing the original bill with costs, including the costs in the suit at law brought by the register on the bond. The court will retain the cross suit to adjust the accounts between the parties, for which purpose there must be a reference to a master.

Costigan is to be charged with his receipts in respect of the premises, and credited with his disbursements, including the money which he originally advanced. Interest is to be computed, on both sides of the account; and the company is to pay to him the balance found due by the master, with the costs of the cross suit.

The receiver will pass his accounts, and will thereupon deliver the possession of the mortgaged premises, to the company.(a)

(a) The rail road company appealed from this decree to the Chancellor, who on the 26th of May, 1845, modified it so far as to direct Costigan to convey the property

Lee v. Highland Bank.

LEE v. THE HIGHLAND BANK and FOWLER's Administrator.

The principle of the rule, that where a person becomes a surety in a note to be used for a particular object, the principal cannot divert it from that object without the surety's assent; applied as between the principal's administrator and the surety, in favor of the latter, to the proceeds of such a note remaining in the principal's hand at his death.

The administrator's claim to retain the proceeds is no better than that of the intestate would have been if he had been living.

Albany, Dec. 20, 1844; January 21, 1845.

THE bill was filed by Leonard Lee on the 12th day of April, 1844, against The Highland Bank, and John W. Brown, Esq. as administrator of Gilbert Ogden Fowler, late of the village of Newburgh, deceased; praying to have a note delivered up and cancelled. The note was for \$1500, dated December 27th, 1843, and payable the first of May ensuing; was made by the complainant, payable to Mr. Fowler, indorsed by him, and was discounted by the Highland Bank, on the day of its date. The bank received from Lee the discount on the note, and delivered to him their draft on a New York bank for the \$1500. It being found in Mr. Fowler's room after his death the same evening, indorsed by Lee, it was returned to the cashier of the bank by Mr. Fowler's son and was never used.

The opinion of the court states all the other facts that were deemed material.

S. Stevens, for the complainant.

N. Reeve and *M. T. Reynolds*, for the defendants.

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to the company on being paid the balance found due to him with interest and costs, and on being indemnified against his bond accompanying the mortgage. In all other respects, the decree was affirmed with costs.

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having received the draft issued upon discounting the note in question, the same day that they parted with it ; have very properly left the controversy to be settled between the complainant and the administrator of Fowler. The case has been argued on the footing that the draft, which was in Fowler's possession at his death, had come to the hands of the administrator.

On this basis, I think there will be no difficulty in arriving at a result which will be equitable in regard to the remarkable circumstances of the case, as well as conformable to established principles.

The facts are involved in much obscurity by the sudden death of Mr. Fowler. The transaction was not a mere exchange of notes, which of itself implies mutual benefit and accommodation. This is shown by Lee's paying the discount on the note to the bank and delivering to Fowler a draft for the whole \$1500, and by the admission in the answer that Lee made his note and procured the draft solely for the accommodation and benefit of Fowler ; while there is no pretence that Lee was to be benefitted in any manner by the operation.

I take these facts to be established. Mr. Fowler, being confined to his room by illness, sent for the complainant and procured him to give a note for \$1500 payable to Fowler's order, to take it to the Highland Bank at Newburgh, of which Fowler was president, have it discounted, pay the discount, take the \$1500 in a sight draft of that bank drawn on a New York bank, and to deliver the same to Mr. Fowler. This was all done for Fowler's sole benefit and accommodation.

The object which Fowler had in view, and for the promotion of which the complainant thus lent his credit, is stated in the bill ; and I think it is substantially proved by the circumstances and the testimony of Isaac V. Fowler. The latter says his father was to pay to one of the heirs of his deceased brother-in-law, \$1500 on the occasion stated in the bill, or one not materially variant ; and that on the 24th of December, his father told the witness that he would send to the witness in New York, by the middle of that week, a draft for \$1500 to pay to that heir.

This draft procured for Fowler by the complainant, was obtained on Wednesday of that week. It was drawn on New

York, on a letter sheet so as to be sent by mail. The coincidence of circumstances, in the absence of proof of any other occasion or object which Fowler had for such a draft, leads to the conclusion, that it was obtained for the specific purpose of being remitted to his son and paid to his brother-in-law.

It is not probable that Fowler made his request of the complainant without informing him at least in general terms for what he wanted the accommodation, and I am bound to infer that he stated the object truly.

His death the same evening, while the draft still laid upon his table in his sick room, prevented its ever being applied to the intended object.

The complainant therefore by the note in question, became the surety for Fowler to raise money and obtain a draft for a specific object and purpose. The money was raised and the draft procured, but owing to the sudden death of the principal, it never was applied to that object. For the determination of the point, it is deemed to be remaining in the hands of the administrator of the principal.

And the question is, which has the better right to the draft, in equity; the complainant, in order to withdraw the note he lent, or the administrator, to distribute it among the creditors of Fowler?

There can be but one answer to this question in the forum of conscience; and the law concurs in that response. The administrator's claim is no better than Mr. Fowler's would have been, if he had lived and instead of using the draft for the purpose intended, had repudiated that intention and taken it to the bank and sought to apply it on some of his current liabilities there.

When a person becomes the surety for another in a note, to be used for a particular object or purpose, the principal cannot divert it from that object, without the surety's assent. And if he do so divert it, neither he, nor any one with notice of the diversion, can maintain any action upon it, or set up any right by virtue of the transaction.

This principle will be found in *Denniston v. Bacon*, 10 Johns. 198. See also *Wardell v. Hughes*, 3 Wend. 418; *Brown v. Taber*, 5 ibid. 566; *Woodhull v. Holmes*, 10 Johns. 231; *Skild-*
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ing v. Warren, 15 *ibid.* 270; *Beers v. Culver*, 1 Hill, 589; *Grandin v. Le Roy*, 2 Paige, 509.

In *Bonser v. Cox*, 4 Beavan, 379, 384; S. C. 5 Lond. Jurist Rep. 164,(a) John Cox made a joint and several promissory note with Richard Cox, to Messrs. Monells, for which the Monells were to advance the amount to Richard by two drafts at three months each. Instead of advancing the drafts, they made the advance in cash immediately. Lord Langdale, Master of the Rolls, held that John Cox, the surety, was thereby discharged. He also held that it made no difference, if it were shown that the money was applied for the purposes intended by the surety.

On these grounds, I am satisfied that the administrator of Fowler is not entitled to retain the draft as against the complainant; and the bank having received it, they must deliver up the note in question to the complainant. They must also refund to him the sum paid by him for the discount of the note.

The decree must be without costs. Mr. Brown was acting as administrator, and could not with safety relinquish the claim without the sanction of a court; while the other defendants stood in the situation of stakeholders, ready to yield to either party with the assent of the other, and incapable of deciding the nice question at issue between them.

McCABE v. COONEY and O'BRIEN.

In setting up a bankrupt discharge as a defence in an *answer*, it is not necessary to use the same precision, and certainty that is requisite in a *plea*.

An *answer* stating that the defendant made his application, and showing its terms; that he then resided in the district where it was made; that he was a bankrupt within the act of congress, and was owing debts which were not contracted as executor, &c.; that upon regular proceedings had in the District Court he was decreed a bankrupt and the decree is still in force; and that upon further regular proceedings, he was discharged from his debts by a decree of the court, and re-

(a) S. C. 6 Beav. 110; and affirmed on appeal, 9 March, 1844.

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ceived a certificate; the certificate of discharge being then set out at length; was held to be sufficient as a pleading, to establish the defence.

It is not necessary in such an answer, to allege that the complainant's debt was not within the class of debts which are excluded from the operation of the bankrupt law. If the complainant intends to insist that his debt was one of that class, he must state the fact in his bill, as he would any other matter of avoidance.

After a debtor had been decreed a bankrupt, and before he was finally discharged, a judgment creditor's suit was commenced against him, and the creditor claimed to have discovered a piano, which he was entitled to have applied towards his debt. The answer set up the bankrupt proceedings and the debtor's discharge. *Held*, that if the piano were acquired by the debtor prior to his bankrupt proceedings, it became vested in his assignee by force of the decree; and if it were acquired subsequently, the discharge was a bar to the creditor's claim in respect of his judgment.

Albany, Dec. 23, 1844; January 25, 1845.

THIS was a suit brought by a judgment and execution creditor of the defendants. The judgment was recovered in December, 1842, and this suit was commenced in December, 1843.

On the 2d of March, 1843, Cooney presented his petition for a discharge from his debts under the late bankrupt act, and he was discharged accordingly on the 30th of January, 1844.

In his answer, Cooney set up his proceedings in bankruptcy and insisted that the judgment as against him was thereby discharged; in the following terms.

"And this defendant further answering, says, that after the rendition of the said judgment in the bill of complaint mentioned against this defendant and the said Timothy O'Brien, and before the filing of the complainant's bill of complaint, this defendant then residing in the city of Albany, and within the northern district of the state of New York, and being largely indebted, and owing debts which had not been created in consequence of defalcation as a public officer or as executor or administrator or in any other fiduciary capacity, became a bankrupt within the true intent and meaning of the act of Congress entitled an act to establish a uniform system of bankruptcy throughout the United States, passed August 19, 1841. And being such bankrupt as aforesaid, to wit, on the second day of March, 1843, applied to the District Court of the United States, for the Northern District of the State of New York, by petition according to the rules and practice of said court for the benefit of the said act. And such

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proceedings were had in and before said District Court, on his said petition, according to the rules and practice of said court, that this defendant before the filing of the said bill of complaint, was by a decree of said court, declared a bankrupt, and which said decree remains in full force and effect. And this defendant further answering says, that such other and further proceedings were had by and before said court on the said petition of this defendant, and according to the rules and practice of said court, and the provisions of said act, that afterwards, to wit, on the thirtieth day of January, 1844, this defendant by an order or decree of said District Court of the United States for the Northern District of the State of New York, was fully discharged from all debts owing by him at the time of the presentation of his said petition for the benefit of the said act; and on the same day of said decree this defendant did also receive from the clerk of the said court a certificate of said discharge as a bankrupt, which discharge is in the words and figures following, to wit." (Here the discharge was set forth *verbatim*.)

"And this defendant insists and submits to this honorable court, that the said judgment against this defendant and the said Timothy O'Brien mentioned in the complainant's bill, so far as it affects or regards this defendant, the said William Cooney, is fully and absolutely discharged by the discharge aforesaid of this defendant. And this defendant further insists and submits to this honorable court, that any lien or interest acquired by said complainant in and by said bill or any proceeding thereon, became and was fully discharged and extinguished in and by the said discharge under and by virtue of the said decree of the said District Court of the United States for the Northern District of the State of New York."

The proofs showed that at the commencement of the suit Cooney owned or had an interest in a piano forte worth about \$165; but it did not appear distinctly when he acquired it.

O'Brien denied having any property, and there was no evidence to the contrary.

C. Stevens, for the complainant.

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W. W. Frothingham, for the defendants.

THE ASSISTANT VICE-CHANCELLOR.—It is contended by the complainant's counsel that the bankrupt discharge is not sufficiently set out in the answer to show that the court granting it, had jurisdiction. The defects alleged are, the omission to state that the petition of the bankrupt contained a list of his creditors; together with an inventory of his estate; and the failure to charge in the answer, that the complainant's debt is not one of those which are excepted from the operation of the bankrupt act. Finally, the counsel insisted that the answer must state all the matters showing the jurisdiction of the court, and the course of proceeding, with the same precision that the Supreme Court held to be requisite in pleading a bankrupt discharge, in the late case of *Sackett v. Andross*, 5 Hill, 327.

The answer of Cooney sets forth his application; that he was then a resident of the city of Albany in the Northern District of this state, and was largely indebted and was owing debts which had not been contracted as executor, &c., (following the exception contained in the act of Congress.) That he became a bankrupt within the meaning of the act of Congress, referring to its title, &c. at large; that being such bankrupt he applied to the United States District Court in the Northern District by petition, according to the rules and practice of that court, for the benefit of the act. That such proceedings were had in that court, according to its rules and practice, on such petition that the defendant was declared a bankrupt by a decree of the court which remains in full force; and that such further and other proceedings were had in that court according to its rules and practice and the act of Congress, that afterwards by a decree of the court, he was discharged from his debts; and he received a certificate thereof from the clerk under the seal of the court. The discharge itself is then set out, *verbatim*.

This is the substance of the pleading, and as *an answer*, I think it sufficient. It is by no means clear, that if it were contained in a plea, it would be held defective in this court. The case of *Carleton v. Leighton*, 3 Merivale, 667; (S. C. Beames' Pleas in Equity, 122,) decided in 1805, is a strong authority in

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favor of great certainty and strictness in such a plea. Sir Samuel Romilly argued there, that the plea must state distinctly, the trading, the contracting debts, the petitioning creditor's debt, the act of bankruptcy, the commission, the finding the party bankrupt, and the assignment; and Lord Eldon said it was clearly contrary to all practice to plead bankruptcy without stating all the facts successively and distinctly, and to admit a mode of pleading by general language would be very inconvenient. The plea there set forth that a commission of bankruptcy was duly issued, under which the party was afterwards duly found and declared a bankrupt, and all his estate and effects were duly transferred and assigned, &c. ; and the plea was overruled.

Nevertheless in 1818, in the similar case of *De Tastet v. Sharpe*, 3 Madd. 51, a plea of bankruptcy was allowed by the Vice-Chancellor, which did not contain the successive facts; and indeed in reference to the English bankrupt acts then in force, was more meagre in its statements than the answer in question.

It is laid down in a book of practice of high authority, that although in stating a defendant's case, it is necessary to use such a degree of certainty as will inform the plaintiff of the nature of the case to be made against him, it is not requisite that the same degree of accuracy should be observed in an answer as is required in a bill. (2 Daniell's Ch. Pr. 244.) And the author illustrates the proposition by the manner of stating a *modus* in a bill and in an answer. (1 Ibid. 479, 480; See 1 Barb. Ch. Pr. 138, s. p.)

Resort is frequently had to an answer, in order to set up a defence which would be appropriate in a plea, for the reason that less certainty and precision is required in an answer than in a plea.

I think I should require more observance of technicality and form in preparing an answer, than is requisite to promote the ends of justice, and more than is customary in our practice, or called for by the principles of equity pleading, were I to decide that this answer is defective in its statement of the bankruptcy proceedings and discharge.

Nor do I think it necessary for the *answer* to allege that the complainant's debt was not within the excepted debts which are

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excluded from the operation of the law. That fact, like any other matter intended to avoid the effect of the discharge, must be shown by the complainant. In support of the answer, the certificate of the defendant's discharge, is sufficient evidence for him, until it is impeached or avoided.

My conclusion is that the answer and testimony show that the judgment against Cooney is discharged; and if, as the complainant contends, the property in question was acquired since his petition in bankruptcy, so that it did not pass to his assignee, such discharge is a bar to the complainant's reaching it by the judgment.

If on the other hand, the property were in truth acquired by the defendant prior to his proceedings in bankruptcy, it became vested in his assignee, on his being decreed a bankrupt. The decree was made at least ninety days prior to the date of his discharge, and therefore the property was vested in the assignee in bankruptcy before this bill was filed.

The bill must be dismissed, but without costs as to Cooney. The costs of O'Brien may be set off against the complainant's judgment.

KNICKERBACKER v. BOUTWELL and others.

A purchaser of two city lots took an assignment of an old mortgage which included those and ten other lots. By the various mesne conveyances from the mortgagor, the two lots were subject to a portion of the mortgage as between them and three other of the twelve lots, and in common with those three, to a larger proportion of the mortgage as between them and the remaining seven lots. On a bill by such purchaser to foreclose the mortgage, and praying for a sale of the twelve lots;

Held, 1. That the charge upon the two lots being imposed by the recorded deeds and mortgages thereon, executed by those through whom the complainant derived his title; actual notice to him was of no consequence.

2. That as to so much of the mortgage as was at all events to be paid by the two lots, there was an absolute merger when the complainant received an assignment of the mortgage, and an extinguishment of so much of its amount. But that as to the residue thereof, (including the part for which his two lots were liable only

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in the event of a deficiency in the three with which they were charged in the larger proportion,) there was no merger.

It appearing, upon holding the complainant's two lots liable for the sum primarily charged on them, that there was not one hundred dollars actually due and in arrear when the bill was filed, and there being no obstacle to a sale of the premises in parcels; the bill was dismissed on that ground.

The maturing of instalments during the pendency of the suit, so that at the hearing there was more than one hundred dollars in arrear to the complainant on the mortgage, does not aid the jurisdiction of the court, which must be determined by the state of things existing when the suit was commenced.

Albany, Dec. 23, 24, 1844; January 25, 1845.

THIS was a bill filed April 1st, 1843, to foreclose a mortgage executed by O. and P. Boutwell to John Gary, Jun., for \$1600 on the first day of June, 1835; conveying a tract of ground in the fourth ward of the city of Troy, which was subsequently laid out into twelve city lots.

On the 17th of June, 1835, the Boutwell's conveyed in fee to Anthony Christian, a portion of the premises equal to five city lots, and Christian at the same time executed to them a mortgage on the whole, by which he agreed to pay one thousand dollars with interest of the mortgage to Gary. Christian's mortgage was recorded three days afterwards.

Christian conveyed three of the five lots at a subsequent date, to Bunnell and Boutwell, who on the 10th of November, 1836, conveyed two of the same to J. and J. Boyle, and received a mortgage in return, by which the Boyle's in respect of those two lots agreed to pay \$720 with interest of the original mortgage to Gary. The title of the other of the three lots conveyed to Bunnell and Boutwell, remained in them or their grantees.

Christian retaining two of the five lots conveyed to him by the Boutwell's, a judgment was docketed against him on the 8th day of February, 1837, and on an execution issued thereon the sheriff sold the two to Chauncey P. Ives. Ives received a deed from the sheriff on the 3d day of September, 1839, and on the 3d of October, 1839, conveyed the two lots to the complainant.

On the same day that they conveyed to Christian, June 17, 1835, the Boutwell's sold and conveyed a parcel which afterwards became three lots, to Nathan Brownson; who executed to them a mortgage on the same, by which he agreed to pay \$600

with interest on the original mortgage to Gary. This mortgage as well as the deed, were recorded.

One of these three lots, by sundry mesne conveyances, vested in the defendant, W. Johnson, one other was vested in the same manner in the defendant John Ash; and the third lot in the defendant Brooks.

Of the remaining four lots originally mortgaged, the Boutwell's conveyed three to the defendant Harvey Mosher, on the same day that they conveyed to Christian and Brownson. Mosher subsequently sold and conveyed two of the same to the defendants Moran and Manning, retaining the other lot.

There was one lot of the twelve which remained in the Boutwell's after the 17th of June, 1835, and its history was not traced; but there was no question raised in regard to it at the hearing.

Answers were put in by Mosher, Moran and Manning, and by J. and J. Boyle; setting forth the several conveyances, mortgages and agreements before mentioned, and insisting that there was a merger of the original mortgage in respect of the two lots owned by the complainant, and that the five lots conveyed to Christian and the three lots conveyed to Brownson, were primarily liable to pay the whole of that mortgage, in the proportions fixed by the respective subsequent mortgages. The answers also insisted that there was not one hundred dollars due and in arrear for principal and interest on the original mortgage, when the suit was commenced. The facts on this point will be found in the opinion.

The cause came on to be heard on the pleadings and proofs.

J. Holmes, for the complainant.

J. D. Willard, for the defendants, J. and J. Boyle, Ash and Johnson.

C. D. Sheldon, for Mosher, Moran and Manning.

THE ASSISTANT VICE-CHANCELLOR.—The complainant is the owner of two lots of the twelve into which the mortgaged premises have been divided in and by the various sales made

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since the execution of the mortgage. His title was derived from Chauncey P. Ives, by a deed dated October 3, 1839. Ives obtained his title under a sale made by the sheriff, upon a judgment against Anthony Christian. The sheriff's deed was executed September 3, 1839, and conveyed all the right and title which Christian had on the 8th day of February, 1837.

Christian's title originated in a deed from Oliver and Phordice Boutwell, the mortgagors, dated June 17th, 1835, which deed conveyed five of the twelve lots mortgaged, including the two that came to the complainant. At the time of the execution of this conveyance, Christian executed to the Boutwells a mortgage on the same five lots, by which he assumed the payment in respect of those lots, of one thousand dollars, part of the mortgage in question, with interest. The mortgage from Christian was recorded June 20th, 1835.

On the same day that they conveyed to Christian, the Boutwells conveyed three other lots to N. Brownson, charged in the same manner with \$600 of the mortgage in question; and three lots to Harvey Mosher, absolutely.

Several of the defendants have acquired titles under these conveyances.

I should state, that the deeds exhibited show, that the lands mortgaged were equal in extent to twelve lots, each twenty-five by one hundred feet, exclusive of the ground covered by Eighth-street; the deed to Christian conveyed land divisible into five such lots; and the sheriff's deed conveyed a parcel fifty feet by one hundred, which I have called two lots, and will designate as numbers 4 and 5. The complainant has therefore become the owner of two-fifths, (territorially) of the tract which was conveyed by the Boutwells to Christian. And upon the testimony which I have already mentioned, he took the same charged with the payment of \$400 with interest, on the mortgage in controversy, that being two-fifths of the amount assumed by Christian in respect of the whole five lots.

The defendants have produced a deed to J. and J. Boyle for two of those five lots, (viz. Nos. 8 and 9,) and a mortgage thereon executed by J. and J. Boyle, which prove, that as between the latter and the owner of the complainant's two lots,

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they were to pay \$720, and the two lots only \$280, of the \$1000 thus charged upon the five lots. In respect of all the other grantees of the mortgaged premises, the two lots stand liable to make good the whole sum of \$1000 before mentioned.

It is of no consequence whether the complainant had actual notice of this charge or not. It was fastened upon the land by the recorded mortgage given by Christian in 1835, and all those deriving title under him, were subjected to that charge.

When the complainant took an assignment of the mortgage in question, the mortgage was merged in respect of the two lots whereof he then had the legal title, to the extent of the \$280 of principal and the arrears of interest on that sum, which were at all events to be paid by those two lots. In the event of the two lots of Boyle proving insufficient to pay the \$720 charged on them; the complainant's lots, together with the fifth lot charged by Christian (which he conveyed to Bunnell and Boutwell,) would still be liable to make good the \$1000 charged on the five lots.

I do not think that there was any merger in equity, beyond the sum for which the complainant himself was primarily liable, as the owner of lots four and five. (*McKinstry v. Mervin*, 3 J. C. R. 465; *Milspough v. McBride*, 7 Paige, 509; *Skeel v. Spraker*, 8 *ibid.* 182.)

If there were to be a decree for a sale, it would conform to the principles which I have stated.

The defendants however, insist that there was not \$100 of interest due when the bill was filed, and that it must be dismissed for that cause.

The bill was filed on the 1st of April, 1843, and claims that there was then due for interest \$223 74.

The principal sum is payable in 1845, and the interest was payable annually on the first day of June. The complainant's allegation must therefore be tested by the unpaid interest which fell due on or before the 1st June, 1842. The mortgage was not assigned to the complainant till March, 1843; so that the merger of the \$280 may be left out of view, and the case considered upon his liability to pay the interest on that amount.

The indorsements on the bond itself prove that only \$109 20, remained unpaid. It remains to be seen whether the complainant was not his own debtor for a portion of this sum.

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The interest is paid in full to June 1, 1839. Of the \$112 interest which fell due on the 1st of June, 1840, \$71 40 was paid on the 23d of June, and \$21 on the 14th of August; both sums being indorsed on the bond as received of A. Bunnell, who was then an owner of lot seven, (the fifth Christian lot,) as shown by the documentary evidence. These payments left \$19 60 in arrear, that is precisely the amount of interest which the complainant was then liable to pay in respect of his two lots.

The indorsements on the bond show the same state of things exactly, in regard to the interest that became due on the 1st of June, 1841.

Of that which was due on the 1st of June, 1842, Ash and Brooks paid each \$21, thus discharging the interest on the \$600 charged upon the three lots conveyed to Brownson, each of them owning one of those lots. This left unpaid the \$70 interest, which was payable by the five Christian lots.

The indorsements on the bond show presumptively, that the complainant paid no part of the interest accrued since 1839; and inasmuch as he ought to have paid \$19 60 in each year, it would thus appear that of the \$109 20 in arrear, he ought to have paid \$58 80 himself; and the amount really due, would be reduced to \$50 40.

The testimony of Boutwell, if admitted proves that the complainant paid his share of interest for two years. This, if applied to the interest which accrued after June 1, 1839, would leave the sum of \$89 60, only, as due and in arrear when this suit was commenced.

I am clear that the jurisdiction cannot be aided by the fact that more interest has become due during the pendency of the suit. The complainant must recover, if at all, on the state of things existing when the suit was commenced.

The point was distinctly presented in the answers, and the authorities are decisive that it is fatal to the suit. (2 R. S. 173, § 37. *Douvo v. Shelden*, 2 Paige, 323; *Barton v. Forbore*, per Chancellor, August 16th, 1842, 2 Barbour's Abstract of Chancellor's Decisions, 59.)

I have not examined the question as to the competency of Boutwell as a witness. The documentary evidence is sufficient for the defence, without his testimony.

The bill must be dismissed with costs.

WILLIAMS v. WALKER.

A solicitor or agent who is employed to procure the assignment of a bond and mortgage, or to invest money upon such securities, is not thereby authorized to receive either the principal or interest, when his client or constituent takes and retains the possession of the securities.

When in such cases, the solicitor or agent is expressly authorized to collect the interest, the debtor is not warranted in inferring that he is authorized to receive the principal debt.

The debtor is authorized to infer, that the solicitor or agent is empowered to receive both interest and principal, from his having possession of the bond and mortgage. So if he have the possession of the bond, without either the mortgage or the assignment.

But such inference being founded upon the custody of the securities, ceases whenever they are withdrawn by the creditor; and it is incumbent upon the debtor who makes payments to the solicitor or agent, relying upon such inference, to show that the securities were in his possession, on each occasion when the payments were made.

The authority thus implied from the possession of the securities, is not limited to a receipt of the whole principal in one sum. It is like the authority of an attorney employed to collect a debt, who may exercise a discretion as to receiving it in partial payments.

Where a solicitor who had effected a loan on bond and mortgage, received a part of the principal debt while he had the possession of the securities, and subsequently received the whole debt after they had been withdrawn from him, but never paid to the lender any part of the principal, though he continued to pay her interest on the entire sum, as if it were collected from time to time on the bond and mortgage; it was held that the payments of principal received by him while he held the securities were valid, and that those paid afterwards did not impair the bond and mortgage. And that the mortgagor was not entitled to be credited towards the debt, the interest which the solicitor paid out of his own funds to the lender previous to the discovery of his fraud, upon that portion of the principal which was discharged by the payments held to be valid.

Dec. 11, 1844, and Jan. 4, 1845; January 30, 1845.

THIS was a bill to foreclose a mortgage on a house and lot in the city of New York, executed by Joannah Walker to Isaac Halsey, together with her bond, to secure the sum of \$1700, dated November 24th, 1832. The bond and mortgage were assigned by Halsey to the complainant on the 20th of May, 1833, after three hundred dollars of the principal had been paid and

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indorsed. Notice of the assignment was at once given to Mrs. Walker.

The bill claimed that the remaining \$1400 was due, with arrears of interest. The answer set up that the whole mortgage had been paid, both principal and interest, to Evert A. Bancker as agent for the complainant.

The defendant proved in evidence the receipts of Bancker, which showed the payment of the same to him in full. The first receipt for any part of the principal, was for \$100, dated November 25th, 1835; and the last receipt dated November 23d, 1841, was for \$114, which the receipt stated was in full of the bond and mortgage, which he thereby engaged to have cancelled and discharged. Between those dates, there were sixteen receipts given at different periods, on account of both principal and interest, for sums ranging from \$30 to \$300.

Bancker was examined as a witness for the defendant, and testified, that in May, 1833, he became the complainant's solicitor and agent, and for several years invested her money and collected her interest. He made the investment in this bond and mortgage for her, and attended to the execution of the securities. He received the principal and interest in full, as shown by the receipts, but had not paid any of the principal to the complainant. He had no special authority from her to receive the principal, nor any express direction. The securities were delivered to her after the investment was made, and she resided in this city. Afterwards he had the bond in his possession for about eighteen months, during which time the first payment on account of principal was made to him, and two or three of the next succeeding payments. On one occasion when Mrs. Walker made a payment, he showed the bond to her. He considered himself authorized to receive the principal as well as the interest. The complainant from 1835 to 1837, was absent in Europe nearly two years, during which time the witness and Thomas W. Pearsall held a general power of attorney from her.

Mr. Pearsall, for the complainant, testified that Miss Williams went to Europe in the fall of 1836 and returned in the ensuing summer, during which time he was her agent and had the bond and mortgage in question, which he received from her previous

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to her departure. Bancker paid the interest on the whole \$1400 secured by the bond and mortgage to the witness, down to February, 1842.

It appeared that he actually paid it till the year 1843.

E. Sandford, for the complainant.

J. Lozier and *W. K. Thorn*, for the defendant.

THE ASSISTANT VICE-CHANCELLOR.—Mrs. Walker has paid to E. A. Bancker the whole principal sum secured by this mortgage, and no part of it has been received by Miss Williams, to whom the mortgage belonged. The money appears to be irretrievably lost, and the question is upon which of these parties must the loss be imposed.

It is contended on the part of Mrs. Walker that Bancker was the agent and solicitor of Miss Williams, and that Mrs. Walker was warranted by his apparent authority, in paying to him the principal, as well as the interest of the mortgage.

About the time when the mortgage was assigned to the complainant, Bancker became her solicitor to invest money for her, and to collect the interest on such investments. He procured the assignment of this bond and mortgage for her, and paid her money to the mortgagee. He never had any authority from her to receive the principal money or any part of it. During her absence in Europe, in 1836-7, he and Mr. Pearsall were her general agents, by a written power of attorney; and no doubt were authorized to receive the principal, as well as interest upon her securities. But this was a joint power, which Bancker could not exercise alone.

Aside from the joint authority to Pearsall and himself, it does not appear that he was at any time the general agent of the complainant. Nor is there any course of dealing shown between her and Bancker, in reference to her securities or investments, from which the court can infer, or Mrs. Walker was entitled to assume, that he was authorized to receive the principal sums which he or others had invested for her.

The authority of Bancker (if there were any which can relieve

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Mrs. Walker from this cruel loss,) must be derived from his capacity as solicitor for investing, and as agent for collecting the interest; and from the transactions in respect to this particular security.

Bancker's agency in these investments, was the same as that of a money scrivener in England. These scriveners are usually attorneys and solicitors. They look up investments, see to perfecting the securities, generally collect the interest, and are oftentimes intrusted with the possession of the securities and the receipt of the principal loaned.

The decisions upon this class of persons, in England, are therefore directly applicable to the case.

In this instance, the bond, mortgage and assignment were delivered to Miss Williams by Bancker, upon the loan being made.

Mr. Paley says that if money be due upon a written security, it is the duty of the debtor, if he pay it to an agent, to see that the person to whom he pays it is in possession of the security. For though the money may have been advanced through the medium of the agent, yet if the security do not remain in his possession, a payment to him will not discharge the debtor. And even the agent being usually employed in the receipt of money, does not in this instance, constitute such an authority as will secure the debtor. (Paley on Agency, by Lloyd, 274.)

Such has been the settled law of this court for a long period.

In *Henn v. Conisby*, 1 Cha. Ca. 93; S. C. 1 Eq. Ca. Abr. 145, pl. 1, (decided in 1668,) one Yarnay, a scrivener, lent out Conisby's money to the plaintiff on a mortgage and recognizance. Conisby kept the security. Four years after the loan was made, the plaintiff paid the principal and interest to Yarnay, who never paid it to Conisby, although he continued to pay the interest upon it. The general trust reposed in the scrivener, was there urged as making an authority for him to receive payment. On the other hand, it was said that the circumstance of Conisby's keeping the security was conclusive, and that no man would pay the money due on a mortgage and recognizance, or even on a bond, without having the security given up; and the plaintiff's payment to the scrivener, without having up his security, was an evidence that he trusted the scrivener more than Conisby did,

who always kept the security ; and he that trusted most must be the sufferer. Sir O. Bridgman, Lord Keeper, decided that the payment to the scrivener did not discharge the debt.

In *Gerrard v. Baker*, cited in 1 Ch. Ca. 94 ; and also stated in 1 Eq. Ca. Abr. 145, pl. 2 ; the money was paid to one that usually received it for the obligee, yet the obligee not having trusted him with the bond, it was held no good payment.

In *Roberts v. Matthews*, 1 Vern. 150, (A. D. 1682,) the defendant employed one Smith, a scrivener, to loan £50 for him, which Smith did to the plaintiff, on his bond to the defendant, and about three months afterwards, delivered the bond to the defendant. The plaintiff all along paid his interest to the scrivener, and about five years after giving the bond, on the scrivener's calling for it, paid to the scrivener £30, and took his receipt for it, as received for the defendant. Lord Chancellor Nottingham adjudged it to be a void payment, for the reason that the bond being in the custody of the defendant and not in the scrivener's, the plaintiff ought to have seen his money indorsed on the bond.

In *Wostenholm v. Davies*, Freem. Ch. R. 289 ; S. C. 2 Eq. Ca. Abr. 709, (A. D. 1705,) the plaintiff had borrowed £100 of the defendant's testator on bond, which was procured by Williams, a scrivener. The bond was taken by the obligee when it was executed. The plaintiff paid several years interest to Williams the scrivener, and £50, part of the principal money, which the scrivener paid to the obligee. The last £50 was also paid to the scrivener, who broke, without paying it to the obligee. The question was whether the plaintiff was to lose the money or the obligee. And Sir John Trever, the Master of the Rolls, said that it was the constant rule of this court, that if the party to whom the security was made, trusted his security in the hands of the scrivener, payment to the scrivener was good payment ; but if he took the security into his own keeping, payment to the scrivener would not be good payment, unless it could be proved that the scrivener had authority from the party to receive it ; and although in this case the scrivener had received the interest and part of the principal, and paid it to the obligee, yet that did not imply that he had any authority to receive it ; but as long as he paid it over, all was well, and any one else might have carried to the party as

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well as he ; and the plaintiff not proving that the scrivener had any authority from the obligee to receive, he was forced to pay the last £50 again ; although the Master of the Rolls declared that he thought it a very hard case.

In *Curtis v. Drought*, 1 Molloy, 487, (A. D. 1828,) one Robert, who was the common agent of Margaret Bradford and T. Drought, in 1794, negotiated a loan of £300, belonging to Bradford, for which the bond of Drought was executed to her, and handed to Robert, who delivered it to her. The interest was regularly paid to her by Robert till 1816, when she died. Robert testified that he was commissioned by her generally, to lend her money as it came to his hands. He received the principal in 1810. The Chancellor held that it was no discharge of the bond.

He says, that "if one employs an agent to lend money and take a security, which he delivers to his principal, the agent has no authority to discharge the bond. No one would be safe, if an attorney who was employed to take a security for money could be permitted to say he had received back the amount, and discharged the debtor. There has often been a question touching the extent of the authority of an agent who has been permitted to hold the security in his hands, whether he had power to cancel the security and discharge the debt ; and there are some cases of great nicety upon that, (citing *Prec. in Ch.* 209.) But it has never been heard of, when the owner has had the precaution to take the instrument containing the evidence of the debt into his own custody, that the agent then had authority to receive the amount and give a valid acquittance."

These principles have been recognized in various other cases. (*Anonymous*, 16 Vin. Abr. 272, Payment, C. ; *Duchess of Cleveland v. Executors of Dashwood*, Freem. Ch. R. 249 ; *Whitlock v. Waltham*, 1 Salk. 157 ; S. C. 1 Eq. Ca. Abr. 145, pl. 4 ; *Penn v. Browne*, Freem. Ch. R. 214 ; and Mr. Raithby's Notes to 1 Vernon, 150.)

The case of *Whitlock v. Waltham*, just cited, shows that the receipt of the interest from time to time, not having possession of the bond, does not make out any authority to receive the principal.

And where the scrivener or agent for the loan retains the securities, and enters into an agreement to compound the debt, the obligee is not bound. (*Parrot v. Wells*, 2 Vern. 127; *Penn v. Browne*, *ubi supra*.)

In the Duchess of Cleveland's case, before cited, the payment to the scrivener was held good, on the ground that the money was made payable at his house; the bond and mortgage were left with him; and for all that appeared, they continued at his house until the payments were made.

Mr. Justice Story says that an agent authorized to take a bond is not to be deemed as of course entitled to receive payment of the money due under that bond. But if he is intrusted with the continued possession of the bond, an implication of such authority may be deduced from this fact, in connection with the other. (Story on Agency, § 98, 104.)

The only case which I have met with, that appears to conflict with this unbroken current of authority, is *Spencer v. Wilson*, 4 Munf. R. (Va.) 130. There a general agent had sold lands, and for a part of the purchase money had taken three bonds of the purchaser, and transmitted them to his principal. One of the bonds was subsequently returned to him by the principal for collection, and he received the amount of it, together with a part of one of the other bonds. The payment of the latter was held to be good. The case itself is either carelessly reported or was a loose decision. The only question in it which appears to have been argued at the bar, was that of the jurisdiction of equity to relieve after a judgment at law on the bond; and the decision upon that point was not in accordance with the law in this state or in England.

I feel perfectly clear upon the authorities as well as the reason of the thing, which has been sufficiently illustrated by my citations, that, previous to the time when Bancker obtained possession of the bond of Mrs. Walker, no payment of principal to him was valid to discharge the debt.

In the English cases, a distinction was taken and maintained between a bond or other security which might be cancelled by delivery to the debtor, and a mortgage whereby the estate passed, and upon which a release was requisite to reinstate the title.

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And it was held, that although the scrivener possessed the mortgage, it would not empower him to receive more than the interest on the debt, whereas if he held a bond he might receive and discharge the principal. (*Martyn v. Kingsley*, Prec. in Ch. 209; *Whitlock v. Waltham*, 1 Salk. 157.)

In the Duchess of Cleveland's case, (Freeman, 249,) the Master of the Rolls, Sir John Trevor, held in conformity with this distinction; while Lord Keeper Wright was of the opinion that the scrivener holding the mortgage might well receive the principal debt.

In this state, where in equity the title is deemed to remain in the mortgagor, and the mortgage is regarded as a mere security which may be cancelled by delivery, without any deed or release; the reason given in the cases cited, for making a distinction between the receipts of a scrivener who has a bond and one who possesses a mortgage, is entirely inapplicable. And I have no doubt that the inference of authority from the possession of a mortgage by an agent should be as strong here, as that derived from the possession of a bond or other security.

In practice, the bond is with us the representative of the debt when it is accompanied with and secured by a mortgage. The payments made toward the debt are indorsed upon the bond. They are very seldom indorsed upon the mortgage.

Therefore in the case before me, while Baucker had the possession of the bond, although he had neither the mortgage nor the assignment, Mrs. Walker was, in my judgment, entitled to presume that he was authorized to receive the principal, as well as the interest on the bond and mortgage.

I do not think that the authority thus implied is to be limited to a receipt of the whole principal in one sum. The implication is, that the bond was left with him on the same footing as if it were left with an attorney for collection. In such a case, if any discretion is to be exercised as to the receipt of a part only of the debt, it is a discretion with which the agent is clothed by the possession of the security.

Before going to the payments made while Bancker had the bond, I will examine another point which is made by the defendant. She insists that Bancker having exhibited the bond to her

while he had it, thus proving his authority to receive payment of it, she was justified in continuing to pay to him until she had notice that the bond was withdrawn from his custody, or the authority otherwise revoked.

This point cannot be sustained. The authority is wholly unlike a general power, or a general direction to pay to the agent.

It rests entirely upon the fact of the possession of the bond. While that possession continued, the payments were justified, even if Mrs. Walker were ignorant of its continuance. Her safety required her on each occasion to look to the bond, the sole evidence then of this special authority; and to see that her payments were properly indorsed. If she chose to pay without this caution, it did not impair the validity of the payments, while the special authority in fact continued; but the moment the bond was withdrawn, her payments thus improvidently made, wrought no discharge of the debt.

She was then reposing a confidence in Bancker which Miss Williams was unwilling to accord to him, and the loss that ensued must devolve upon Mrs. Walker.

In *Baldwin v. Billingsley*, (2 Vern. 582; S. C. 1 Eq. Ca. Abr. 146, pl. 5,) a bequest of £200 had been made to Phillips and Parker, trustees, in trust for the separate use of Mrs. Billingsley. The money was lent to Baldwin and a bond taken in the name of the trustees, and by them delivered to Billingsley, who always kept it. Parker collected £100 for Baldwin and gave him a receipt for it on account of the bond. Lord Keeper Wright held it was no payment. He said Parker might have received the money and applied it, if he had been in possession of the bond; and that the payment to Parker by Baldwin, *without seeing the bond*, was not a good payment.

This view of the subject appears to be sanctioned by Judge Story, who reposes the implication of the authority upon the *continued possession* of the bond. (Story on Agency, § 98.)

I am compelled by my conclusion as to the law, to allow Mrs. Walker only those payments of principal which she made during the time Bancker had possession of the bond.

He testifies that he had the bond when he received the first

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payment of principal, and that it was in his possession about eighteen months.

He connects it also with Miss Williams's absence in Europe, whence she returned, according to Mr. Pearsall's testimony, in the summer of 1837. Bancker also says there were two or three other payments of principal made while he had the bond.

Assuming that there were three others made, the principal paid during that time was \$356, in four payments, extending from November 25th, 1835, to July 13th, 1837.

Mrs. Walker must be credited for these four payments of principal; and the mortgage must be declared a valid lien for the residue.

This is a case of great and peculiar hardship to Mrs. Walker; one which I would gladly have relieved against, were it possible, consistent with the maintenance of sound and important rules of equity; and with dispensing exact justice to the equally innocent creditor. The fraud and iniquity of Bancker is the more odious and reprehensible, that it was practised upon two confiding women. This fraud the court cannot avert or repair, and the loss must be disposed of according to settled rules of law; whether one or the other of the sufferers be the best able to abide its consequences.

As to costs, the complainant claimed that the whole principal was due. This is not sustained, and I will limit the complainant's cost to the amount which she would have recovered on the bill taken as confessed.

Mr. Thorn, for the defendant, on the decision being pronounced, urged that on the principles declared by the court, the principal sum in the mortgage ought to be further reduced, by having applied thereto the interest which Bancker paid to Miss Williams from time to time on the \$356 of principal which he had collected and withheld from her.

Mr. Sandford, contra, insisted that such payments of interest were made by Bancker from his own funds, on a debt which by the decision was due from him to Miss Williams.

THE ASSISTANT VICE-CHANCELLOR.—I do not perceive any equitable ground for this claim. Mrs. Walker paid no such interest. She paid to Bancker *interest on the \$1044 balance of the principal*, and she also paid to him divers sums *as principal*, which he obtained from her by fraud. In respect of these sums, *he was her agent* and not Miss W.'s. He was a faithless agent, and Mrs. W. had an action against him for the money thus paid. So in respect of the \$356 paid for principal, while he had the bond, *he was Miss W.'s agent*. He was faithless to her in pocketing that money, and she had her remedy or action for the amount. But both Mrs. W. and Miss Williams were at the time ignorant of his fraud and of their respective legal rights and injuries growing out of it.

Then take the payment of interest in November, 1837, it being the first after the sum of \$356 was paid.

Bancker paid to Miss W. the six months interest on \$1400. It was all due to her, and she received it as interest, supposing that it all came from Mrs. W. In fact only the interest on \$1044 was paid by Mrs. W. The residue was paid by Bancker himself, who was then the debtor to Miss W. for the remaining \$356. Thus Miss W. although ignorant that Bancker was her debtor for that sum, actually received the interest that was her due, from the identical person who owed it to her.

Now the fact that at that time, Bancker was the debtor of Mrs. Walker, in the small payment of principal erroneously made to him in September before, and she was the debtor to Miss W. for principal on the same mortgage, furnishes no plausible reason for depriving Miss W. of the payment that Bancker made to her upon his debt to her, and bestowing the same upon Mrs. W. by a forced credit to her for principal with Miss W.

It would be compelling Miss W. to lose what her agent, (in respect of the \$356,) rightfully paid to her upon his debt; and giving the benefit of it to Mrs. Walker because Bancker as the agent of the latter, (in respect of the principal paid after July, 1837,) had wrongfully omitted to pay over the monies with which she had intrusted him.

The form of the credit upon the bond, is in favor of Miss W. It is indorsed as paid *for interest*. It was due for interest; and

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it cannot affect her right to it that she was ignorant from whom it was due, so long as she received it from the actual debtor.

In this result, Mrs. W. is credited for the payments of principal, *at the time they were made*. She has paid no interest on them since, and none is awarded against her.

On the principal claimed in her behalf, she would be entitled to have credited to her, the payments made to Miss W. for interest by Bancker, after Mrs. W. had paid Bancker the whole bond, and was no longer making payments of either principal or interest.

Decree accordingly.

SUAREZ v. PUMPELLY and others.

The owner of land in fee, executed declarations or certificates of trust to sundry persons, by which he acknowledged that each owned an equal share therein, and agreed to hold the land in trust for them, and to exercise a power in trust to sell and dispose thereof for their benefit, and to divide the proceeds amongst them; and if directed by them, to allot, and divide and set apart the land to and among such owners. The validity of the trusts not being questioned,

Held, that each holder of a certificate had an interest in the covenant and powers contained in the same. That the powers were to be exercised by the declarant personally; and that he could not delegate them, or substitute other persons to execute them in his stead.

The declarant's economical conduct of the trust, his skill and success in effecting a sale, and his judgment and impartiality in making a partition, were elements of the contract between him and the beneficiaries, and formed a part of the inducement for their purchase of the shares or certificates.

On the trustee's becoming incapable of executing a trust, the court of chancery will carry it into execution in behalf of the parties interested.

Nov. 13, 1844, and Jan. 8, 1845; January 31, 1845.

On the 12th day of October, 1836, Joseph L. Joseph and wife conveyed to John L. Graham in fee, two equal undivided third parts of a farm in Southport, Chemung county, containing about four hundred acres.

On the 22d of April, 1837, Mr. Graham executed twenty declarations of trust under his hand and seal, each of which recited

the conveyance to him from Joseph and wife, and then proceeded in these words;

"And whereas I have received such conveyance and hold the said premises in trust, and to exercise a power in trust for and on behalf of certain persons entitled to share in the proceeds and profits thereof, of whom William P. Powers of the city of New York is one, and whereas such property is valued at the sum of eighty thousand dollars, and the same has been distributed and allotted in eighty shares, each share being of the value of one thousand dollars. Now know ye, that in consideration of the sum of one thousand dollars, this day paid to the said Joseph L. Joseph by the said William P. Powers, being his proportion of the purchase money of such premises, I the said John Lorimer Graham, do declare, certify and make known, that I have taken such conveyance, and hold such premises in trust and for the purpose of exercising a power in trust of selling and disposing of the same and every part and parcel thereof, in manner following, to wit: to sell the whole or such portion thereof as the persons holding a majority of the said shares shall specify, at such time or times and at public or private sales, and for cash or convertible securities, and upon such notice, as they shall direct. And out of the proceeds of such sale or sales as shall be made, first to pay all necessary and proper expenses, and after such payments, then to divide and apportion such net proceeds as they shall from time arise, to and among the holders of such shares respectively, and to pay to the said William P. Powers or his assigns, one-eightieth part of such net proceeds as the same shall arise. And further, in case it shall be so directed by the holders of a majority of such shares, then to allot and divide and set apart such premises, or any portion of of them remaining unsold, to and among the said several holders of shares therein."

On each of these instruments there was indorsed an acknowledgment signed by J. L. Joseph and stating that he had received from William P. Powers the sum of one thousand dollars being the consideration monies expressed in the instrument. And there was also indorsed on each, a blank assignment signed and sealed by Powers, in the presence of a witness in the words following, viz.

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"For value received, I do hereby grant, bargain, sell, assign, transfer and set over unto the within instrument of writing, and all my right, title, interest, claim and demand in and to the premises therein particularly mentioned and described. To have and to hold the same to him and his heirs and assigns forever."

At the same time Graham executed twenty like instruments to W. G. Wood, twenty to W. English and twenty to T. T. Greasley; all of which were indorsed in the same manner.

These declarations were then delivered to the various parties in interest. None of them were recorded in the county of Chemung. At the time this suit was commenced, the complainant held and owned for the benefit of a foreign house, ten of the declarations of trust or certificates, and Harmon Pumpelly held and owned sixty-seven. The parties were ignorant as to the holder of the three remaining certificates, which were three of those issued in the name of W. G. Wood.

On the 26th of October, 1841, Mr. Graham being apprehensive that judgments or decrees would be docketed against him, which would become a lien on the legal title to the lands in question, in order to secure the holders of the certificates from the embarrassments which might ensue, and with the advice and direction of the holders of forty-seven of the same, conveyed the whole premises in fee to Augustus W. Clason, Jr., and Mordecai Ogden.

On the 29th of July, 1843, Mr. Pumpelly, owning sixty-seven of the certificates, directed Messrs. Clason and Ogden to advertise the premises for sale, and to sell them at auction to the highest bidder, at the capitol in the city of Albany on the 6th of September ensuing; and they were advertised accordingly, in several newspapers. On the day appointed, the premises were, sold in pursuance of the advertisement, and were purchased by Mr. Pumpelly for \$5100, to whom a deed was executed by Messrs. Clason and Ogden.

On the same 4th of September, prior to the sale, the bill in this cause was filed against Clason, Ogden, and Pumpelly together with A. Gordon, one of the complainant's beneficiaries. The bill prayed to restrain the sale then advertised, and that the pre-

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truses might be sold or divided under the direction of the court. I charged that Graham's grantees had notice of the trusts on which he held the title, and that his conveyance and substitution was made without the complainant's consent. The complainant contended that Graham had no power of substitution, and that the persons to whom he had conveyed, could not execute the trusts in his stead; and if they could, that their attempted execution of them, was defective.

Messrs. Clason, Ogden and Pumpelly, answered, and claimed that the conveyance by Graham and the sale to Pumpelly, were valid. Clason and Ogden claimed no interest in the premises, nor any right, other than to execute the trusts in the manner which Graham had undertaken by the certificates. They had received from Pumpelly and proffered to the complainant, his share of the proceeds of the sale.

C. B. Moore and F. B. Cutting, for the complainant.

A. W. Clason, Jr., for himself and M. Ogden.

M. Hoffman, for H. Pumpelly.

THE ASSISTANT VICE-CHANCELLOR.—The deed from Joseph to Graham, appears to have vested the latter with an absolute and unqualified estate in fee, on the 12th of October, 1836.

The declarations of a trust in the lands conveyed, executed by Graham in April following, could not have the effect to divest the absolute estate acquired by the deed.

By those instruments, he declared that he was a trustee of the lands which had been thus conveyed to him. He covenanted to hold them in trust, and to exercise certain powers in trust in the disposition of the lands and their proceeds.

The validity and effects of those powers, are not called in question by any of the parties; and the defendants concede, nay assume, on their part, that on the conveyance by Graham to Ogden and Clason, the latter took the property subject to the execution of those powers.

The questions are, whether Ogden and Clason could rightfully

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execute the trust powers ; and if they could, was their attempted execution of them conformable to the declarations of trust.

The powers to be exercised were ; to sell the premises, or such portion thereof as the majority of shares should specify, at such times, at public or private sale, and on such notice and terms, as the majority of shares should direct. Out of the proceeds to pay all proper expenses, and apportion and divide the residue to and among the holders of the shares. And if so directed by a majority of the shares, to allot, divide and set apart, the unsold premises, to and among the shareholders.

The instrument contains no reservation or provision of a power of appointment or substitution by Graham, of any person or persons, to do these acts in his stead. Upon such an instrument, delivered to each shareholder, each appears to have paid the price or consideration for his share. Each shareholder thus acquired a right and interest in the covenants and powers contained in the declaration of trust.

The powers were to be executed by Graham personally. The manner of their execution, was important to the parties in interest. His skill and success in effecting a sale ; his economical conduct of the trust ; and his judgment and impartiality in making a partition, if that should become necessary ; were elements of the contract which the parties entered into by this trust deed, and which the court upon the construction of the trust, must infer were a part of the inducement for the purchase of the shares.

It seems to me perfectly clear, that such powers cannot be delegated, without an express provision in the deed creating the powers, or the consent of all the parties.

The conveyance from Graham to Ogden and Clason therefore, while it may have transmitted the legal title, did not clothe them with the powers in trust which are contained in the declarations executed to the shareholders.

They could not proceed to sell at auction or otherwise, under the direction of the majority of the shareholders ; and the proceeding instituted for that purpose, as stated in the bill, was nugatory.

This conclusion renders it unnecessary to look into the mere

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regularity of that proceeding, in respect of the forms prescribed by the trust.

A sale under the direction of the court, is doubtless the proper mode of winding up this trust. But all the necessary parties for that purpose, are not before the court.

The three outstanding shares, and Mr. Graham should be brought in. If the owners of the three shares cannot be ascertained, it may suffice to bring in as defendants, the persons in whose names the declarations of trust for those shares were issued.

In the meantime, an order may be entered directing the cause to stand over for the purpose of adding those parties, and reserving all further questions and directions.(a)

MARTIN and BANKS v. SHERMAN and others.

Where a testator directs his executors, after paying legacies, to sell his real estate to the best advantage in their power, and as sound discretion might direct, and then to divide the whole proceeds equally among his children; there is an equitable conversion of the land; the quality of personalty is given to its proceeds to all intents; and it is to be considered in equity as personal property for all the purposes of the will.

The executors under such a will, made a sale which was alleged to be invalid by the heirs of one of the daughters of the testator who survived him. Her husband having ratified the sale and received a part of the proceeds; *Held*, that her husband was entitled with her assent to receive her share of the proceeds, and that his ratification of the sale was conclusive in respect of the same.

Jan. 13; Feb. 18, 1845.

On the 15th of October, 1835, the executors of John Taylor, sold at private sale and conveyed to the complainants several lots of land in the city of New York, of which the testator died sei-

(a) The complainant made further parties, and on the cause being brought to a hearing at a subsequent term, a decree was made directing a sale of the premises, and a distribution of the proceeds among the holders of the certificates. The sale and deed to Pumpelly were set aside.

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sed. The executors settled with the residuary devisees and legatees, all of whom who were competent to act for themselves, acquiesced in the sale, and ratified it by receiving portions of the proceeds. A question was afterwards made by purchasers from the complainants, as to the validity of their title, in consequence of the executors having sold to them at private sale instead of advertising the lands and selling them at public auction; upon the force of the act of 1835, (Session Laws, ch. 264, p. 304,) in connection with 2 R. S. 109, § 56.

The adult devisees and legatees who were living confirmed the sale; but one of the residuary devisees and legatees, Mrs. Janet Sherman, having died in the mean time, leaving infant children; the complainants filed their bill to have the title conveyed to them by the executors declared valid, or to have it quieted and confirmed.

It appeared that on the first of April, 1836, Charles Sherman, the husband of Janet, received from the executor a part of her share of the proceeds of the sale, and gave a receipt for the same, referring to the sale and ratifying their proceedings. Mrs. Sherman died in 1843, leaving twelve infant children. She made no application or claim for a settlement during her lifetime.

The bill was taken as confessed by all except the infant defendants, and the cause was heard as to them, on their guardian's answer and the testimony.

E. S. Van Winkle, for the complainants.

C. A. Sherman, for the infant defendants.

THE ASSISTANT VICE-CHANCELLOR.—The complainants insist that the sale to them by the executors of John Taylor, was regular and valid.

This presents an important question, upon which I prefer not to express any opinion, inasmuch as there is another point upon which I have no difficulty, and which is decisive of the case.

After sundry devises and bequests, the testator disposed of the bulk of his estate in these words.

“12th. I do hereby direct and empower my executors, all or

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whoever of them shall qualify and undertake the trust hereby reposed in them, after having paid and secured the bequeathments herein made, to sell and dispose of the remainder of my estate, both real and personal, to the best advantage in their power, and as sound discretion directs, and then divide the whole proceeds equally, share and share alike, among my four sons and three daughters, to wit James S., Andrew, Robert L., and Scott, Margaret, Elizabeth and Janet, or their heirs, and should any of them die and leave no lawful heirs, such share or shares to be considered part of the residuary estate and divided as such."

Under this clause, although there was a discretion as to the time of sale, the direction to sell the real estate was absolute and imperative. It was only after such sale, that it could be divided, or indeed that it was to be received, by the four sons and three daughters.

The gift to them was not of land, but of the proceeds of land to be sold, and of personal estate.

Thus the quality of personalty was given to the produce of this real estate *to all intents*; and not merely for any particular purpose of the will.

There was therefore, an equitable conversion of this real estate, and it is to be considered in this court, as having been personal property for all the purposes of the will. (*Cruse v. Barley*, 3 P. Will. 20, and Mr. Cox's note, *ibid.* 22; *Ackroyd v. Smithson*, 1 Bro. C. C. 503, 505; *Walker v. Shore*, 19 Ves. 387; *Van Vechten v. Van Veghten*, 8 Paige's R. 105; Leigh & Dalz. on Eq. Conv. 50, &c.)

The bequest of one-seventh of this property, was directly to the mother of the infant defendants. It was a bequest of personalty, not limited to her separate use, and her husband was entitled to it by virtue of the marriage. Mrs. Janet Sherman had an equity in the fund for a settlement, which this court would have protected; but the executors, in the absence of any such interposition, had a right to pay the whole amount to her husband. This equity was personal to her. After her death, or after her implied assent to the payment to her husband; her children could not claim under that equity, or set up any equity of their own.

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It is evident therefore, that the children of Mrs. Sherman, had no estate or interest in the property in question, or in its proceeds, upon her death.

It was proved that Charles Sherman, the husband, ratified the sale made by the executors, the next year after it took place, and received a share of the proceeds. He was thereby estopped from questioning its regularity, or its propriety; and those who have succeeded to him are concluded by his acts.

The complainants are entitled to a decree, declaring their rights accordingly, and directing the infant defendants by their guardian ad litem, to execute to them a proper release and confirmation. The form of the deed may be settled by a master.

The complainants must pay the costs of the guardian ad litem.

BANKS and others, EXECUTORS of McCarthy, v. WALKER.

Where the title to real estate fails, the purchaser has no remedy in equity to recover back the price, unless there was fraud or deceit in the sale.

The only recognized ground of equitable interference to stay the collection of the unpaid purchase money, in the absence of fraud, is a failure of the consideration by reason of a defect of title clearly established, and an eviction from the possession of the land.

These facts may be shown as a defence, when the collection is attempted in chancery, notwithstanding the deed contains covenants of title.

An eviction is established by proof that at the time of the purchase, the lands sold were actually occupied under a valid hostile title, so that the purchaser could not obtain possession of the same, and whereby he never did obtain actual possession. *Withers v. Codwise*, note *a*, page 350.

In a suit for the foreclosure of a mortgage, the defendant set up that the mortgage was given for the purchase money, that the lands were conveyed to him without covenants, and that one claiming a paramount title had commenced an ejectment for the recovery of the lands, which was in vigorous prosecution, and if successful, would divest all the mortgagor's title except a dower right. The defendant entered into the possession of the lands at the time of his purchase, and had not been turned out or evicted.

The defence was overruled, and a decree made for the sale of the lands, and against the mortgagor for the deficiency, in case the proceeds of the sale were insufficient to pay his bond accompanying the mortgage.

A bill by the mortgagee against the mortgagor, and the adverse claimant of the land, would be multifarious.

Jan. 21; Feb. 19, 1845.

THE bill was filed by the executors of Eliza McCarthy, to foreclose a mortgage for \$19,250, executed to her by Joshua Walker, on the 14th day of December, 1836. The premises mortgaged, are a lot with the buildings thereon, known as No. 352, in Broadway, in the city of New York, forming a part of the Carlton House. The lot was formerly the residence of Dennis McCarthy, who died intestate, seised of the same on the 29th of July, 1835. He left no children, and it was supposed that all his relations who would otherwise have taken by descent, were aliens at the time of his death. Eliza McCarthy, the testatrix, was his widow. On her petition, the legislature passed an act on the 25th of May, 1836, entitled, an act for the relief of Eliza McCarthy, (Laws of 1836, c. 481, p. 737,) by which the commissioners of the land office were to release to her the interest of the state by the escheat, on her paying into the treasury a proportion of the ascertained value, as required by law of widows in such cases; and, provided that the real estate be sold under the direction of the Vice-Chancellor of the First Circuit, and the net proceeds, less the sum paid to the state, should be divided between her and Joanna Bant, who was an alien heir of D. McCarthy. Mrs. M. was to join in the sale and release her dower. Under this act and an order of the Vice-Chancellor founded thereon, a master sold the premises, and they were purchased by Mr. Walker for \$38,000. Previous to the sale, Mrs. McCarthy paid to the treasurer of the state \$1344 65, pursuant to the act for her relief, and received a release.

The bond and mortgage in question were executed to Mrs. McCarthy for the half part of the purchase money. She joined with the master in executing a deed to Mr. Walker, who was let into possession immediately, and has remained in the possession until the present time. The deed recited that all of the heirs of Dennis McCarthy were aliens, and that the premises had escheated to the state. It then recited the act of the legislature, and the proceedings under it, to and including the sale. There were no covenants of title in the deed, nor any other, except that Mrs. McCarthy covenanted against her own acts. For the other half of the purchase money, Mr. Walker gave a mortgage to Mrs. Bant, which he paid off before the suit was

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commenced. In 1843, one Dennis McCarthy, residing at Rome, in the county of Oneida, claimed the premises, as the heir at law of D. McCarthy, deceased. It appeared that this Dennis was a native of Ireland, who emigrated to Canada, and then to this state, and that he was naturalized and became a citizen before the death of the elder Dennis McCarthy. The claimant alleged that his grandfather was a cousin of the father of D. McCarthy, of New York. In June, 1843, he commenced actions of ejectment against the tenants of Mr. Walker, to recover the premises, claiming them in fee. These suits were put at issue, and were pending when the bill was filed, and at the time of the hearing. A commission had been taken out in the suit at law, to take testimony in Ireland.

On this claim being made, Mr. Walker ceased to pay interest on the mortgage, and in reference to this foreclosure, he made a formal request of the complainants, that they would make the adverse claimant a party to the suit, in order to have the title settled, and justice done to all.

The facts were set up by Walker in his defence to the foreclosure. Also that Mrs. McCarthy had falsely represented to him the state of the title. Testimony was taken in the cause, and it was heard on pleadings and proofs.

W. S. Sears, for the complainants.

J. R. Whiting, for the defendant.

THE ASSISTANT VICE-CHANCELLOR.—The defence rests upon two grounds:—

First, that Mrs. McCarthy represented to the defendant on his purchasing the property, that all the heirs at law of her husband were aliens, whereby his real estate escheated to the people of this state; whereas, in fact there was an heir of her husband residing in this state, who had been naturalized, and was capable of inheriting his real estate; and that Mrs. McCarthy well knew of the existence, title, and claim of this naturalized heir, when she made such representation.

The defendant has not sustained these allegations. There is

no proof whatever that Mrs. McCarthy knew, or had ever heard of the alleged claimant, or that she knew, or had any reason to believe that the recital in the defendant's deed, to the effect that the late Dennis McCarthy died leaving no heir capable of inheriting his estate, was untrue.

This puts an end to the point of misrepresentation ; even if it were proved that the claimant, (the Dennis McCarthy of Oneida county,) is an heir of the late Dennis McCarthy of this city.

But there is no such proof of heirship.

It is proved that this person was naturalized before the intestate's death, and that he claims as heir. Moreover, he is called as a witness, (with what propriety I will not stop to inquire,) and testifies that *he believes* that his grandfather and the intestate's father were cousins.

The belief of the claimant does not advance the defendant a single step, in proving the validity of the claim.

This branch of the defence is therefore to be laid aside.

Second. The remaining ground is that the mortgage in question was executed for a part of the purchase money of the property ; that the defendant has no covenants of title for his protection ; and that Dennis McCarthy of Oneida county, claims the land as the heir at law of the intestate, and has commenced actions of ejectment for its recovery, against the tenants of the defendant. It is also alleged that this claim, if maintained, is paramount to the title derived from Mrs. McCarthy, or by means of the escheat ; that in such event the consideration of the mortgage will have wholly failed ; and that the collection of the bond and mortgage ought not to be enforced, until the trial and determination of that claim.

The defendant insists too, that the complainants ought to have made the claimant a party to this suit, so as to have settled all the questions in controversy. This is an error. The bill would have been multifarious, if it had brought in as a party, one claiming the title in hostility to both the mortgagor and the mortgagee.

There are some facts which should be mentioned before proceeding to the main question.

Mr. Walker became the purchaser of the property for \$38,500, and gave to Mrs. McCarthy, this bond and mortgage for one-half

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of the purchase money. The residue he secured to Mrs. Bant, and it appears that she has received it in full. Mrs. McCarthy had a right of dower in the property, which she conveyed to the defendant.

Mr. Walker has been in the possession of the premises from the time of the sale (December, 1836,) to the present time.

The question recurs, do these facts constitute any defence to the suit?

It is well settled, that where the title to real estate fails, the purchaser has no remedy in equity, to recover back the price, unless there was fraud or deceit in the sale. If he has taken the precaution to require covenants as to his title before paying the price, his remedy is in the courts of law. (2 Kent's Com. 473, 2d ed.; *Abbott v. Allen*, 2 John. Ch. R. 519, 523; *Gouverneur v. Elmendorf*, 5 ib. 79; *Chesterman v. Gardner*, 5 ib. 29; *Bates v. Delavan*, 5 Paige, 300; *Denston v. Morris*, 2 Edw. Ch. R. 37; *Leggett v. McCarthy*, 3 ib. 124; *Tallmadge v. Wallis*, 25 Wend. 107; *Edwards v. Bodine*, 26 ib. 109.)

In this case, no failure of title is shown, no eviction. There is simply a claim set up by a stranger. It is not shown to be a valid claim, so that there is no defect of title proved. But it is apprehended that the claim may turn out to be well founded.

I can find no authority or good reason for sustaining such a defence.

In *Bumpus v. Platner*, (1 John. Ch. R. 218,) the question was presented on a bill to have a bond and mortgage delivered up, on the ground of the want of title, and the failure of the consideration. Chancellor Kent dismissed the bill. He said that there was no case of relief on this ground when possession has passed and continued, without any eviction at law under a paramount title; and that such an eviction was an indispensable part of the plaintiff's claim to relief here, on the mere ground of failure of consideration. And he added, "it would be without precedent and dangerous in principle, to arrest and bar the recovery of the debt, while the purchaser is still in possession under the purchase deed, and there has been no eviction at law."

In *Abbott v. Allen*, before cited, the same great jurist examined

the point anew, on a similar bill, where the defendants were proceeding at law upon the bond, and were foreclosing the mortgage by advertisement, under the statute. The Chancellor reiterated the doctrine which he had sustained in *Bumpus v. Platter*, that a purchaser of land who is in possession, cannot have relief here against his contract to pay, on the mere ground of defect of title, without a previous eviction.

It may be suggested that there were covenants of title in *Abbott v. Allen*. That fact did not influence the Chancellor's view of the principle which I have just stated. And it can make no difference in any case where the mortgage is prosecuted in chancery. Whether there be covenants or not, the only recognized ground of equitable interference to stay the collection of the unpaid purchase money, is the same, to wit, a total failure of the consideration by reason of a defect of title clearly established, and an eviction from the possession of the land. If there be covenants in such a case, equity would interfere where the collection was attempted in this court, to prevent circuity of action.

The case of *Johnson v. Gere*, (2 Johns. Ch. R. 546,) is relied upon as sustaining this defence. It was an *ex parte* allowance of an injunction by the Chancellor out of court, and if it were in any respect conflicting, would not be received to set aside the authority of the strongly contested and well considered case of *Abbott v. Allen*, which was decided less than a month before. I suspect that in *Johnson v. Gere*, it was at least apparent, that the widow of Pierson under whom the mortgagor purchased, had only a life estate, and that thus there was a total defect of title established. Be that as it may, I know too well my own liability to err in granting injunctions *ex parte*, to place much reliance upon the opinions of any judge, however eminent, declared on such an allowance, especially when it is brought forward in opposition to his judgment in contested suits.

Chancellor Kent in his Commentaries, expresses the rule on this subject, substantially, as he decided it in *Abbott v. Allen*. He refers to that decision, but does not cite as an authority, the case of *Johnson v. Gere*, (2 Kent's Com. 471, 472.)

In *Leggett v. McCarthy*, 3 Edw. Ch. R. 124, the Vice-Chancellor recognized and acted upon the decision in *Abbott v. Allen*,

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in a stronger case for the mortgagor than the one now before me, for the defence in the answer, (not put in issue,) was that the vendor was not seised and had not a good title to the premises. In the subsequent case of *Withers v. Morrell*, 3 ib. 560, he held the same doctrine, upon an admission that the title to a portion of the premises had wholly failed; so far, as to decree a foreclosure and sale, leaving the mortgagee to his remedy at law upon the bond for any deficiency.

In *Withers v. Codwise*, decided by the Vice-Chancellor at the same time with the case last cited, but not reported, there was not only a total defect of title shown, but an actual eviction equivalent to a legal eviction, the mortgagor never having been in possession, and the land being held adversely under the true title at the time of the sale, and ever afterwards; and the Vice-Chancellor permitted these facts to be presented as a defence to the suit, so far as it sought to charge the mortgagor personally for the debt.(a)

(a) The case of *Withers v. Powers, Codwise and others*, came before Vice-Chancellor McCoun in October, 1841, and was decided January 17th, 1842. The bill was filed to foreclose a mortgage on four lots of land in the village of Williamsburgh, executed for the purchase money by Powers to D. Codwise on the first day of June, 1835, and by the latter assigned to the complainant with his guaranty of its payment. The complainant proceeded to a hearing, when the usual decree was directed for a foreclosure and sale, and for the payment of the deficiency by Powers upon his bond accompanying the mortgage. The defendants had answered, setting up that no title had been conveyed by the deed to Powers, which defence was overruled at the hearing. They then applied to the court on affidavits showing a discovery of material facts since the hearing, to stay the entry of the decree and for leave to file a further or supplemental answer.

It appeared by the answer and the affidavits, that the four lots were part of a large tract which the complainant and others claiming to own in fee, had in 1835, vested in Mr. Codwise as a trustee to sell at auction in their behalf. The purchaser of the four lots, omitting to complete his purchase, Mr. Codwise concluded to take them for his own benefit with the parties' assent, and paid the portion of the purchase money required to be paid in hand. In order to place the transaction in a suitable form, he then as trustee conveyed the lots to W. P. Powers, received his bond and mortgage for the balance of the purchase money, transferred the same to the complainant towards his share of the proceeds of the whole sale, with a guaranty of payment, and then received a conveyance of the lots from Powers subject to the mortgage. Mr. Codwise paid interest for several years, and a part of the principal, before he discovered the defect in the title.

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The Vice-Chancellor well observed in *Leggett v. McCarthy*, that the application of the principle must be the same, whether the mortgagor was the complainant or the defendant, in the particular suit in which the question arises.

This being so, there is no authority upon which I can sustain this defence, and there is authority against it which is conclusive upon this branch of the court.

I am aware that hypothetical cases have been put, and suggestions made by several judges, in arguing the various points connected with this subject, which lend some sanction to the conclusion derived by the defendant from *Johnson v. Gere*. But the controlling decisions are clear, that until there be an ascertained failure of title, and an eviction from the possession, the purchaser

In point of fact, the parties who conveyed to him in trust, had no title to the four lots. One Peter Ferrier obtained the true title in 1807, and had claimed the lots ever since, adversely to the complainant and those associated with him. They were then vacant lots, and were supposed by Codwise and Powers in 1835, and from thence till after the hearing, to be vacant and unoccupied. But before the trust deed was executed to Mr. Codwise a person claiming under a lease from Ferrier erected a shop on the premises, and several years before the hearing, a stable was erected thereon by another tenant of Ferrier's; both of which buildings were occupied from the time of their erection till the motion was made, under Ferrier's title, and in hostility to that of Codwise. The lots were assessed by the municipal authorities as the property of Ferrier in 1831 and 1832, and again in 1840, and were not taxed or assessed in any other name. Ferrier or his agent paid all the taxes and assessments imposed thereon.

Neither Codwise or Powers ever had any actual possession or occupancy of the lots or any part of them, by themselves or by any person claiming under them.

The motion was resisted on the grounds that the application came too late; that Mr. Codwise having taken the title as trustee was chargeable with knowledge of its defects; and that there was no fraud pretended, no covenant of title, and no eviction shown, without which the defendants if let in, could not be relieved.

L. H. Sandford, for D. Codwise.

D. Marvin, for Powers.

J. Slosson, for the complainant.

THE VICE-CHANCELLOR, made an order allowing the defendants to file a supplemental answer stating the facts, on payment of the costs of the hearing and subsequent proceedings; unless the complainant would enter a decree for the foreclosure and sale leaving his claim upon the mortgage and guaranty to be enforced at law.

The complainant never prosecuted his claim further against Codwise or Powers.

The decision of the Vice-Chancellor established that there was an eviction under the circumstances of the case.

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will not be relieved against his bond and mortgage for the unpaid purchase money. For the rule at law, see *Whitney v. Lewis*, 21 Wend. 131; *Lattin v. Vail*, 17 *ibid.* 188.

So in the civil law, the buyer, so long as he is in the undisturbed possession of the thing sold, cannot withhold payment on the plea of want of title in the vendor, or otherwise rescind the contract. (Cod. Lib. 8 tit., 45, l. 3; *Brown v. Reves*, 19 Martin's La. Rep. 235.)

There may be hardship in this rule, but there is no more than is presented in the more frequent instances, where the purchase money has all been paid before any defect of title is suspected, and the purchaser, protected by no covenants, is remediless.

It is one of those hardships which our law cannot obviate, consistently with the principle which it lays down as the foundation of contracts of sale; *caveat emptor*.

Conceding for the purpose of the argument, that the claimant, Dennis McCarthy, inherited the land and will ultimately recover it; this is not after all, a case of the total failure of the consideration.

Mrs. McCarthy had a dower right in the premises which was relinquished to the defendant at the time of the sale. If she were sixty years of age, this interest was worth about one-third of the amount of the mortgage.

Besides, the possession is, and always has been uninterrupted in the mortgagor, and it is impossible for the court to say, as the case stands, that Mr. Walker has not obtained all that Mrs. McCarthy contracted to sell or undertook to convey to him.

The complainants are entitled to the usual decree, for a foreclosure and sale of the lands, and for payment of the deficiency by the mortgagor.

CURRIE and CURRIE v. HART and others.

A general assignment executed by an insolvent debtor, to his brother, who at the time was unfit to attend to business by reason of a lingering disease, which the assignor believed was incurable and of which he died ; was held for that cause to be fraudulent and void as against creditors.

The selection of such an assignee furnishes strong presumption of an intent on the part of the assignor to keep the control and disposal of the property.

The assigned property was almost wholly fees earned in the office of sheriff. The assignor's deputy continued to receive and collect the same after the assignment, and to dispose of them as he had done previously, except that he paid over to the assignor only upon the assignee's direction. This was held to be evidence of fraud in the assignment.

So of an understanding that the assignee should allow to the assignor a weekly sum for his services, the same being nominal.

An assignment by a sheriff of fees due and to become due, having for one of its objects an indemnity of his sureties against future misappropriation of monies which should be collected on executions, is void.

Whether an assignment of future fees by a sheriff, for the benefit of creditors would be valid? *Quære.*

Jan. 9, Feb. 1 ; Feb. 22, 1845.

THE bill was filed on the 23d day of August, 1842, against Monmouth B. Hart, on the return of an execution unsatisfied ; to reach his equitable interests and things in action.

In his answer the defendant set up the execution by him of a general assignment to James H. Hart, for the benefit of his creditors, dated May 10, 1842, and delivered June 10, 1842.

The complainants on the 24th of February, 1843, filed a supplemental bill making James H. Hart a party defendant, and charging that the assignment was fraudulent and void against them as creditors of M. B. Hart. J. H. Hart put in an answer on the 3d of June, previous to which he had at his own request been removed from the trust as assignee, and Cornelius Bergen appointed in his stead by an order of this court dated May 31, 1843.

On the 24th of October, 1843, a second supplemental bill was filed, making Bergen a party. The suit was brought to a hearing on the pleadings and proofs.

It appeared that M. B. Hart was the sheriff of the city and county of New York for three years, commencing on the 1st day

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of January, 1841 ; and C. Bergen was one of the sureties in his official bond.

The assignment to James H. Hart embraced all M. B. Hart's property and effects, including the debts due to him as sheriff, with all the future receipts of the office of sheriff. Its trusts were, *first*, to pay demands against him as sheriff thereafter to be incurred, and such as should accrue against him and his sureties in his official bond. *Second*, to pay all the demands for which James H. Hart was liable for him as indorser or otherwise. *Third*, to pay \$4200 of borrowed money to Benjamin F. Hart. *And fourth*, to pay all the other creditors of M. B. Hart, rateably.

The other material facts will be found stated in the opinion of the court.

G. Buckham and J. W. Gerard, for the complainants.

J. C. Hart, for the defendant M. B. Hart.

W. Rockwell and D. B. Tallmadge, for C. Bergen.

THE ASSISTANT VICE-CHANCELLOR.—I doubt very much whether any interest passed to James H. Hart, the assignee, in the future credits and receipts which were expected to accrue in the sheriff's office, after the date of the assignment. The effect of such instruments, when they operate by way of agreement or estoppel, (see *Wright v. Wright*, 1 Ves. Sen. 409,) would probably be limited and restricted, so as to cease whenever they came in conflict with the equitable lien or priority of a creditor's bill against the assignor. This point, and the grave questions of public policy which are presented by an assignment of a sheriff's whole official fees which are thereafter to accrue, are of so much importance, as well as difficulty, that I prefer to leave them to the decision of judges who will do them better justice than I can ; if there are other grounds upon which this case can be determined.

In respect of the sheriff's fees which had accrued when the assignment was made, they are like debts due to any other individual.

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I will examine the objections to the assignment, as applicable to those fees.

FIRST. The general terms used in declaring the second trust, render its validity questionable. They provide for discharging all legal demands and liabilities which might thereafter be incurred, in and about the management and discharge of the duties of the assignor as sheriff, and all legal claims upon the office or against him as sheriff, which might thereafter arise, &c. &c.

It appears by the testimony, that claims of this character frequently arose, both before and after the assignment, in consequence of the assignor's omission to pay over monies collected by him on executions. This class of claims was of course founded upon a plain violation of his official duty; and an assignment made in contemplation of such official misconduct, and intended to secure the sheriff's sureties from its consequences, would in my opinion, be void. The trust in this instrument is sufficiently broad to include such claims, and was sustained at the hearing as properly and justly applicable to them. It would perhaps, be too harsh to avoid it because it may include a void preference, when there is no expression of a design to provide for such a preference.

But after reading the testimony of the under-sheriff and the coroner, it is difficult to resist the conclusion that this species of claim was a prominent consideration and motive for making the assignment. And if it were, I think, the object being unlawful, the trusts could not be upheld.

I will waive this point, and proceed to the other objections made by the complainants.

SECOND. The selection of the assignee, is one of the alleged evidences of a fraudulent intent in making the assignment.

The assignment was executed on the 10th of June, 1842. It bears date a month earlier, but I find no evidence that it was drawn up prior to that day.

It is proved by a letter of M. B. Hart, dated 21st June, 1842, (which is proper testimony, as he was then in possession of the assigned effects;) that Doctor Hart, the assignee, had been confined to his bed and room for fifteen days, with a disorder which the physicians declared to be a decline or consumption. The let-

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ter shows that M. B. Hart did not believe that his brother would ever recover, and that his only hope was in his brother's going to Rio Janeiro to spend the ensuing winter. He says in the letter, that he has determined to make an assignment to the doctor of all fees, &c., as if the assignment had not then been executed; but as the case stands, the date of its delivery was the 10th of June.

It also appears that Doctor Hart never recovered from the attack mentioned in the letter, which was consumption; and that he was never afterwards able to attend to business to any extent deserving of mention.

This is the case therefore of an insolvent debtor making an assignment in trust for creditors of all his property, and even of his future expectations, to a brother, who as he knows is prostrate with a disease which he believes is incurable; and knowing also that if curable, it will for a year to come, entirely prevent him from giving any personal attention to the discharge of the duties of assignee.

In *Reed v. Emery*, 8 Paige, 417, the Chancellor decided that an assignment by a debtor in failing circumstances to an assignee who is known to be insolvent, is *prima facie* evidence of an intent to defraud the creditors of the assignor, and sufficient to overcome the general denial of fraud in the answer.

In *Cram v. Mitchell*, (January 27th, 1844,)(a) I decided the same point upon an assignment made to three near relatives, all of whom were preferred creditors; one of the assignees being stone blind, another too illiterate to write and scarcely able to read, and the third residing at so great a distance from the property and residence of the assignor, that he could not devote his attention to it, and instead of that, appointed an agent on the spot to look after his interests as a creditor.

The selection of such assignees, furnishes strong presumption of an intent on the part of the assignor, to keep the control of his property in his own hands and under his own disposal. This is the natural and inevitable result, when the assignor is

(a) Reported in 1 Sandford's Ch. R. 251.

physically or mentally incompetent to act efficiently, as well as where his distance from the scene of action precludes his personal care and supervision.

On this ground, I am persuaded that the assignment in question is fraudulent as against the creditors of M. B. Hart.

THIRD. The management of the assigned property is the next point made against the assignment.

The property consisted almost exclusively of the fees earned, and to be earned, in the sheriff's office.

It appears by the testimony that for nearly eleven months after the transfer of the property, there was no change whatever in the custody and control of those things in action, or in the receipt of such as were paid. During all this period, the under-sheriff, who attended in the office and had the charge there during Mr. Hart's whole term, received all the monies paid in for fees and services. He received them as such under-sheriff, and not as agent or in behalf of the assignee; and he paid them out and disposed of them precisely as he had done before the assignment was made, except that he says what he paid over to the sheriff himself was so paid by J. H. Hart's direction. This merely aggravates the apparent fraud, for it shows that the assignee's only active interference was to place money in the assignor's hands in contravention of his duty as trustee. The reason assigned for the assignee's omission to take possession, is its intrinsic difficulty, and his continued ill health. The difficulty is all imaginary, provided the assignment were made in good faith. A clerk placed in the office, a notice to the deputies and the under-sheriff, and to the indebted attorneys; renewed from time to time in respect of the accruing fees, would have answered the purpose.

The ill health of the assignee, if it had been wholly unforeseen, would have obviated the inference arising from his personal inattention; but would not excuse the total omission to act through others. And this omission, coupled with the assignor's knowledge of the situation of his brother when he made the transfer, furnishes presumptive evidence that he made it with the intent to hinder and delay his creditors.

In reference to the household furniture, &c. assigned, it then was and has ever since been, in the possession of M. B. Hart.

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An execution would probably have been upheld against all the claims interposed to protect it; but the requisite parties are wanting to warrant me in deciding that question.

I do not think that the voluntary assignee could have held these chattels, against the mortgage and the executions which were charges upon them. His omission to interfere, therefore does not furnish any evidence of a fraudulent intent.

FOURTH. There is one other circumstance which deserves notice.

Mr. Hart's son testifies that Mr. H. received from the assignee, ten dollars a week for his services, up to the time his term of office expired.

If the assignment were valid to pass the earnings of the office after its date, these payments were made to the assignor wholly out of the fund he had set apart for his creditors. His services, so far as it is proved, consisted of his official title and dignity as sheriff and of nothing more.

Watkins, who in May, 1843, enacted the part of receiver under J. H. Hart, also paid out money on M. B. Hart's orders drawn upon the under-sheriff.

And in his examination before the master under the order for a receiver in this suit, M. B. Hart testified that J. H. Hart allowed him to draw from the fees of the office, sufficient for the support of his family, in compensation for his services; and that his salary was fixed at \$2000 a year, but he had not drawn out at any thing like that rate. This examination was in March, 1843, while M. B. Hart continued in possession of the things in action assigned, and it must be received as competent testimony against the assignee.

The result of the evidence on this head, clearly shows, that although not expressed in the instrument, it was understood and agreed when the assignment was made, that the assignor should receive his support out of the effects assigned.

This of itself, is sufficient to establish an intent fraudulent towards creditors.

I have not adverted to the course of things after the 1st of May, 1843.

The receivership of Watkins, during that month of May, was

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really absurd. He received some monies from the under-sheriff, and paid them out, principally as directed by him; without apparently knowing why he received or paid them. It is plain that he did not succeed in learning much about the assigned property, or in getting any control over it.

After Mr. Bergen became the trustee, matters undoubtedly assumed a different aspect. But the change came too late to efface the indelible badges of fraud which had been stamped upon the assignment by the circumstances which I have considered and detailed.

It is impossible for me, upon the evidence to resist the conclusion that this assignment was intended to hinder, delay or defraud creditors; and it must be declared to be void against the complainants accordingly.

They are entitled to a decree for the payment of their debt, interest and costs, out of the fund upon which they obtained a lien by their bill.

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One who executes a bond and mortgage to another without consideration, or places the same in the hands of the latter, for a particular purpose which is not accomplished; will become liable to pay the mortgage debt to a stranger who advances money or property upon it, if he does any act from which such stranger is authorized to infer that the securities are valid.

A bond and mortgage were executed by three persons to C. on a leasehold property, the principal value of which consisted in a white lead manufactory, with steam engine, machinery and other fixtures, with which those persons conducted business together. The premises were insured in the names of two of them, P. and T. The three deposited the bond and mortgage with C., for him to raise money in their behalf. C. gave no consideration for the bond and mortgage. Being unable to raise the money, C. some months afterwards delivered them to D. as security for a loan of stocks made to him thereon. The stocks not being replaced when due, D. called on P. and T. to assign to him the policy of insurance, which they did, without questioning his right to the securities.

Held, that this was evidence of a loan of the bond and mortgage to C.; and the consideration paid to him by D. was sufficient to support them against the mortgagors.

Held, also from the nature of the property and the business conducted, and the joint interest of the mortgagors, that they were to be deemed partners; and from this,

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and his joining in executing the bond and mortgage and suffering them to remain with C., that the third partner was bound by P. and T.'s transfer of the policy and its consequences.

Such a leasehold is in equity subject to the incidents of the personal property of a partnership.

The ratification of C.'s acts, was held to extend to support an advance which D. was compelled to make to another party, to whom C. had given a prior equitable claim on the bond and mortgage.

Where stocks loaned, are to be returned at a fixed time, the measure of damages on a default, is the market price of the stocks at that time. (*Quere.* See note at the end of the case.)

As between mortgagor and mortgagee, fixtures put up for manufacturing, on property leased for years, are included in and pass by a mortgage of the land.

A bill to foreclose a mortgage, need not allege an indebtedness for which it was given, and if alleged it need not be proved.

: January 21, 29, 30 ; Feb. 22, 1845.

THIS was a suit to foreclose a mortgage, executed to secure a bond for \$6000, by Jacob Perkins, Ezra Town and Edward Clark, to Lucian Curtis and his two partners, Beam and Jones ; dated August 21st, 1843, and assigned to the complainant by the mortgagees on the 11th day of March, 1844.

The answer alleged that the bond and mortgage were given without any consideration, to enable Curtis or his firm to raise money for the mortgagors, which purpose was not accomplished ; and that the complainant knew of these facts when he took the assignment.

It appeared in proof, that the securities were executed for the purpose stated in the answer, and that Curtis failed in his efforts to raise the money ; after which he retained them two or three months.

On the 3d of January, 1844, Curtis & Co. borrowed of the complainant, one hundred shares of the capital stock of the Norwich and Worcester Rail Road Company, which they agreed to return in thirty days, and for securing the contract, as expressed in the receipt for the stock, left with him the bond and mortgage of Perkins and others as security.

Curtis & Co. failed to return the stock, and the complainant pressed for more security. He met Curtis on the 6th of March, 1844, at the store of Perkins & Town, and called on them to assign to him their policy of insurance on the buildings, fixtures

and machinery on the premises mortgaged. They executed to him such an assignment, to which Curtis was a subscribing witness, and delivered to him the policy.

When the complainant advanced the stock, the bond and mortgage, through inadvertence, were not delivered to him. On calling for them, he found them in the possession of Jacob Little & Co., who claimed a lien on them for \$800, which he was compelled to pay in order to obtain them. They came into his possession a day or two after the policy was assigned.

No part of the stock or its proceeds, or of the \$800, came to the use or benefit of the mortgagors.

The premises mortgaged consisted of a lease for years at an annual rent of \$400, of a tract of ground on the East River near the line of Williamsburgh and Brooklyn; on which the mortgagors had erected a large manufacturing establishment, with a steam engine, machinery and other fixtures. They were manufacturing white lead, and they also had a store in the city of New York. The chief value of the demised premises, consisted in the erections and their appurtenances.

When the stock borrowed by Curtis & Co. became due to the complainant, it was worth from thirty-five to thirty-six dollars on a hundred dollars paid in. During the progress of the suit it became worth from seventy-five to eighty-five dollars on the hundred paid.

E. Sandford, for the complainant.

W. Silliman, for the defendants.

THE ASSISTANT VICE-CHANCELLOR.—In the view which I have taken of this case, it is unimportant whether or not the bond and mortgage of the defendants were originally placed in the hands of Curtis, in order to procure a specific loan; or for any purpose of their own which could not be accomplished. I think the evidence is conclusive, that they loaned the bond and mortgage to Curtis, and authorized him to use it for his own benefit or that of his firm.

To sustain their defence, the defendants are driven to call

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Curtis as a witness, who if he succeeds in establishing it, must thereby convict himself of a gross fraud as well as breach of trust. His testimony ought therefore, to be carefully scrutinized, and received with caution. Giving to it, however, the full weight to which the same statement would be entitled, from the lips of a stranger to the transaction, it leaves no room for doubt.

The bond and mortgage were transferred to the complainant, in effect, when he advanced the stock to Curtis, on the 3d of January, 1844. The complainant at that time, became the purchaser of the securities, in good faith, without notice, and for a valuable consideration.

The defendants had executed these securities to Curtis, which declared to all the world that they had received the sum secured, and that Curtis had full authority to sell and transfer them. If their purpose were accomplished, or had, been frustrated; the defendants ought to have withdrawn them. To strangers, the securities expressed the same language as if the defendants had received the whole sum secured to be paid.

The complainant, instead of having any notice or suspicion of wrong, had been apprised of the defendants intention to execute a mortgage on this property, and of Curtis being their agent for the purpose.

Then on the 6th of March, at Curtis's request, and upon the complainant's demand, Perkins & Town transferred to the complainant, their policy of insurance on the manufactory, fixtures &c., situated on the premises.

It is impossible to account for this act on any rational ground, if the defendants did not then know that Curtis had used the bond and mortgage, and if they had not previously sanctioned it, or intended to ratify and confirm it.

This is too plain for argument. The portion of the premises which was insured, constituted their principal value, and the policy therefore made an important and almost vital part of the security to the mortgagee.

It is incredible that these defendants, without a dollar being paid, and without questioning its object or propriety, should have transferred that policy in the manner they did, unless they had known that the complainant was the owner of their bond and

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mortgage, or unless he was about to become such owner with their entire assent.

On either assumption, it was a loan of their securities to Curtis, and the consideration paid to him, became a sufficient consideration to them to support the mortgage.

It is contended by the defendant Clark, that his interest in the premises was not affected by the transfer of the mortgage, because he was not a party to the assignment of the policy of insurance, and therefore not bound by that act or the inferences derived from it.

The mortgaged premises consist of a lease for twenty-one years, on which is erected a white lead manufactory, with steam engines and other appropriate fixtures and apparatus. Clark was a joint lessee with Perkins and Town, and they all had an interest in the business conducted on the demised premises. This business in New York, where their store was kept, went under the name of Perkins & Town.

From the joint demise, the uses to which it was converted, the joint interest in the business, and the character of that business, (it being manufacturing and commercial,) I am bound to infer that they were partners.

Clark had joined in executing the bond and mortgage, and had concurred with the other partners in suffering them to remain in the possession of Curtis. The principal value of the premises mortgaged was of such a nature that either of the copartners could have sold and transferred it, and the leasehold itself was in equity, subject to all the incidents of the personal property of a partnership. (See *Houghton v. Houghton*, 11 Simons, 491; *Dyer v. Clark*, 5 Metc. 562; *Howard v. Priest*, 5 ibid. 582.) The policy, being in the name of Perkins & Town, their transfer sufficed to convey it to the complainant. And in reference to its effect as a ratification, I think when I consider the character of the property, the execution of the bond and mortgage, and its continuance with Curtis; that the transfer of the policy must be deemed the act of the firm, and binding upon Clark in all its consequences.

The mortgage must be declared a valid security to the complainant for the amount of the stock which he advanced.

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'Then as to the sum paid to obtain the possession of the bond and mortgage.

The conduct and acts of the defendants, were not only a sufficient warrant, as it respects the complainant, for Curtis's transfer to him, but authorized him to infer that all the other dealings of Curtis with the securities were rightful and within his legitimate power and control over the same.

Finding the securities under an equitable mortgage for a debt of Curtis, the complainant was compelled to redeem them in order to protect his own title. Curtis asserts that Little & Co. had no right to retain them. There are two strong circumstances against the witnesses opinion. The debt to Little & Co. is undisputed, and they had possession of the securities.

I think the complainant was justified in paying their claim, and is entitled to hold the securities for the sum which he paid.

A question was made as to the amount which the complainant is entitled to recover for his stock loaned.

The stock was to have been returned in thirty days, and the complainant's measure of damages is the price of the stock in the market at the end of that time. (*Gregory v. McDowell*, 8 Wend. 435; *Dey v. Dox*, 9 *ibid.* 129; *Clark v. Pinney*, 7 Cow. 681.)(a)

It is insisted also, that the steam engine, machinery and fixtures, for manufacturing, are not included in the mortgage.

This is incorrect. Although the lessor of the land could not claim them, it is otherwise of the mortgagee of the lessees. The question here is between grantor and grantees, in which case the grantee holds all fixtures whether for trade and manufacture, or for the purposes of agriculture or habitation. (See the authorities in *Walker v. Sherman*, 20 Wend. 636.)

The defendants make two or three other points which I will mention.

It is said that the complainant's bill must be dismissed, because he has not proved the allegation that the defendants were indebted to Curtis and others, for which debt they gave the bond and mortgage.

(a) See note at the end of the case.

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There are two answers to this. First, if the whole allegation of indebtedness were stricken out of the bill, the complainant would be entitled to a decree on the statement of the execution of the bond and mortgage. Second; the evidence which shows that the defendants loaned the securities to Curtis and others, with the bond itself, supports the charge of an indebtedness, *pro hac vice*.

The last suggestion also answers the point, that the bill should have set forth the authority of Curtis to transfer the securities.

It is further objected that the complainant received other collateral securities together with this mortgage, and he ought to show that he has exhausted those, before proceeding upon the mortgage.

I can perceive no good reason why he should show this. If he has received any thing upon the other collaterals, the defendants will have the benefit of it on computing the amount due. If they are of any value, the defendants may be subrogated to them on paying the complainant's claim.

The complainant is entitled to a decree for foreclosure and sale.

If he is content with the price of the stock when it should have been restored, as fixed by the defendant's witness, there need be no reference on that point. In that event, the decree will be for such price with interest, and for the sum paid to J. Little & Co. with interest, and the costs of the suit.(a)

(a) The defendants appealed to the Chancellor, who affirmed the decree with costs, on the 6th of October, 1846. He intimated a doubt at the hearing, whether the complainant was not entitled to recover for the highest price the stock bore in market, intermediate the time when it should have been returned to him, and the commencement of the suit, or the closing of the proofs in the cause. The decision on this point in the court below, is therefore stated with a *quære*.

See the following kindred cases. In *Sadler v. Lee*, (6 Beavan, 384,) where the bankers of trustees wrongfully sold out stock and applied it to their own purposes; it was held that the measure of their liability was the amount paid in replacing the stock. In *Watts v. Girdlestone*, (6 ibid. 188,) it was decided that where trustees are directed to invest trust money on government or real securities, and they do neither, they are answerable at the option of the *cestuis que trust*, either for the money or the stock which might have been purchased therewith.

DELMONICO v. GUILLAUME and DELMONICO.

Where real estate was purchased by two partners, with the funds and for the business of the copartnership, and one of them died leaving the firm without personal property sufficient to pay its debts; it was held that the real estate was in equity to be treated as personal property, and the surviving partner had an absolute right to dispose of it as such, for the payment of the debts of the firm.

As it respects the partners and their creditors, real estate belonging to the partnership, is in equity subjected to the same general rules as personal property.

A farm was purchased by two partners, in their joint names, for the partnership business, was used in that business, and paid for out of the funds of the firm. At the dissolution by the death of one of the partners, the debts of the firm exceeded its personal assets, and the survivor entered into a contract to sell a part of the farm. On a bill filed by him against the purchaser, for a specific performance, to which the heir of the deceased partner was a party, it was held that the survivor was entitled to sell the property, and performance was decreed with a direction that the heir should join in the conveyance.

Jan. 6; Feb. 24, 1845.

PETER A. and John Delmonico became partners as restaurateurs in the city of New York in October, 1827. In 1835, they purchased a farm in the eastern part of the city of Brooklyn, for the purpose of supplying their establishment with vegetables and provisions; and it was used for that purpose several years. It was paid for out of the partnership funds, and was conveyed originally to John, who executed to Peter a deed for an undivided half.

John Delmonico died March 10, 1842, leaving a widow and his only child, Josephine, surviving. He had no property other than that in the copartnership. At his death, the firm were largely indebted and to an amount exceeding their personal property. In order to aid in paying off the debts, the complainant, Peter Delmonico, entered into a written contract with the defendant, by which he agreed to sell and convey to him a part of the farm equal to three city lots.

At the time appointed for the payment of the contract price, the complainant tendered a deed of the three lots to the defendant, which he refused to receive, because the former had no

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title to one undivided half of the farm, the same being vested in the infant Josephine.

This bill was thereupon filed against Guillaume and Josephine Delmonico, to compel the former to perform his contract.

There was no controversy as to the facts, all of which were proved by the testimony as against the infant defendant.

A. Rapallo, for the complainant, cited Story on Part. 128 to 132, 138, and the authorities there cited; 3 Kent's Comm. 64, 5th ed.; Collyer on Part. 76, 2d Amer. ed.; *Dyer v. Clark*, 5 Metc. 562; *Howard v. Priest*, *ibid.* 582.

J. Anthon, for the defendant Guillaume.

G. Gifford, for the infant, J. Delmonico.

THE ASSISTANT VICE-CHANCELLOR.—The proof is full and conclusive that the farm in Brooklyn was purchased by Peter and John Delmonico, while they were partners, for the partnership business; was used for that business; and was paid for out of the funds of the copartnership.

It also appears that the debts of the firm upon its dissolution by the death of John Delmonico, greatly exceeded the value of the personal property owned by the firm.

So far as the partners and their creditors are concerned, real estate belonging to the partnership, is treated in equity as personal property, and subjected to the same general rules.

In this case therefore, Peter A. Delmonico, as the surviving partner, became entitled to the Brooklyn farm, and as between himself and the heir of John, he had an absolute right to dispose of it, for the payment of the debts of the firm, in the same manner as if it had been personal estate.

The authorities to this effect are numerous. (*Fereday v. Wightwick*, 1 R. & Mylne, 45, and observed upon in 1 M. & Keen, 663; *Phillips v. Phillips*, 1 M. & K. 649; *Broom v. Broom*, 3 *ibid.* 443; *Cookson v. Cookson*, 8 Simons, 529; *Townsend v. Devaynes*, 11 Simons, 498, note; *Dyer v. Clark*, 5 Met-

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calf, 562; *Howard v. Priest*, 5 *ibid.* 582; Story on Partnership, § 92, 93; 3 Kent's Comm. 64, 5th ed.)

The case of *Coles v. Coles*, (15 Johns. 159,) was at law. In *Smith v. Jackson*, (2 Edw. Ch. R. 28,) the Vice-Chancellor concurred in the doctrine of the cases before cited, to its extent as applicable to creditors.

Indeed, the cases of *Phillips v. Phillips* and *Broom v. Broom*, go so far as to hold that this farm would be deemed personalty as between the real and personal representatives of the deceased partner. If that doctrine were applied here, the personal representative would be a necessary party to the suit. I will not express an opinion upon the point adjudged in those cases.

There is no doubt that the legal title is vested in the infant defendant, to the extent of one undivided half of the lots contracted to Guillaume. But the equitable right and interest being vested in the surviving partner, the infant is a mere trustee of the legal estate, and the Court of Chancery must compel a conveyance of the estate upon the application of such surviving partner. (2 R. S. 194, § 167; *Broom v. Broom*, *ubi supra*.)

The latter will be required to account for this property as a part of the assets of the copartnership.

If the complainant can make a good title in other respects, he may have a decree for specific performance.

The guardian *ad litem* of the infant will join in the conveyance to Guillaume, executing it for and in the name of the infant. And the complainant must pay the guardian his costs of the suit.

EMMONS v. CAIRNS and others.

The court of chancery will not sustain a bill for the mere purpose of construing a will. It is only when questions under the will, arise incidentally in the exercise of the legitimate powers of the court, where it has jurisdiction for some other purpose, that such construction can be given; as in cases of trust, account and the like.

Such jurisdiction is maintained, at the suit of one claiming the personal estate after the determination of a life interest, asking to have an account taken and the fund secured; so far as to determine the right of the claimant to the remainder in such fund.

A testator gave to his wife for life all the income, rents and profits of his real and personal estate; and after her death gave the like interest to T. for life, out of which she was to support three infants, W., J. and E. Next, he gave the whole rents and income after her death, to W., J. and E. for life, as joint tenants; and then gave the residue of his estate to E. absolutely and in fee, first providing for her fifty thousand dollars when she should arrive at age. Then followed a provision that if E. should die without children or issue, that the whole residue of his estate should go to his cousins.

In a suit by one of the next of kin, in which a construction of the will as to the personal estate became requisite;

Held, 1. That the two first life estates in the income and profits, were valid.

2. That the subsequent gifts of the personal estate were void as suspending the absolute ownership more than two lives in being at the death of the testator.

3. That the legacy of fifty thousand dollars to E. was contingent on her attaining her full age, and was void for the same cause.

4. That T. was not entitled to enjoy the personal property for life, in specie; but that it must be converted and permanently secured, so as to give her the income, and preserve the capital for the next of kin.

January 10; Feb. 25, 1845.

THE bill in this cause was filed in March, 1840, by John Emmons, claiming to be one of the collateral paternal relatives, and as such one of the heirs at law and next of kin of George Rapelje, who died May 5th, 1835, seised and possessed of a very large real and personal estate.

His last will and testament, dated April 5th, 1832, was in the words following:

"I George Rapelje of number three hundred and ten (310) Broadway, of the city of New York, gentleman, being of sound and disposing mind and memory, do make this to be my last will and testament, in the manner and form following, hereby re-

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voking all others. I request as soon as convenient after my death, that all my just and lawful debts and funeral charges be paid. I desire no parade at my funeral; my remains to be taken to East Chester Church burying ground, and deposited by the side of my parents.

"*First.* I give, devise and bequeath unto my wife, Susanna Elizabeth, all the income, rents, issues and profits of all my estate, both real and personal, for and during her natural life, and for and in lieu of her dower, and hereby appoint her executrix of this my will during her life.

"*2d. Item.* After her death, I give, devise and bequeath as a legacy unto all the lawful children of her brother, Benjamin B. Provost, seven thousand dollars to be divided among them, also the silver plate, library of books, furniture and whatever other articles, that were the property of Bishop Provost she may have remaining in her possession at her death, on condition the one hundred and fifty dollars I now yearly pay him, must cease and determine. I also give, devise and bequeath unto them all the Irish estate near Cork, both real and personal now standing in my name, and all my right, title, I or my wife may have thereto, to them and their heirs forever, as joint tenants: those before legacies are left to them, and the income of them to be appropriated to the support and maintenance of himself, wife and children, while they remain together, or rather of those who reside at home, to be the legacies before named, not divided among them till they may all separate or marry, but to be and remain as a fund the income of which to be used as just stated.

"*3d. Item.* I give, devise and bequeath immediately after the death of my wife, the whole income, rents, interests, issues and profits thereof of all my estate, both real and personal, to Ann Eliza Taylor, widow of William Taylor, late merchant of New York, for and during her natural life, out of which income aforesaid, she must support well, educate, board, lodge and clothe the following three persons or individuals: her son William Paul Taylor, aged about seventeen, and is now a midshipman in the U. S. navy, and a short time since sailed in the U. S. ship of war Potomac; a female girl named Ann Janette Smith, aged about between ten and eleven, now at Bethlehem school in Pennsylvania; and

a girl named Ellen Eliza Smith, aged about six years, now in the said Ann E. Taylor, who resides at No. 80 Houston-street, New York ; and who is to designate and identify the two female children and her son William Paul Taylor as afore-named.

"4th. Item. I give, devise and bequeath unto the children or the issue of Ann E. Taylor, ten thousand dollars after her death ; also to the children of William Paul Taylor, and also to children of Ann Janette Smith ten thousand dollars for all the children together, of each of them, should they have any forever.

"5th. Item. I give, devise and bequeath unto the three children before named, that is to say, William Paul Taylor, Ann Janette Smith, and Ellen Eliza Smith, the income afore-named, of all my estate both real and personal, as possessed by my wife and Ann E. Taylor, provided and in case they should outlive her, the said A. E. Taylor, and for them to hold the same as joint tenants for and during their natural lives, and no longer.

"6th. Item. I give devise and bequeath the rest, residue and remainder of the whole of my estate both real and personal, unto the child above and before named, Ellen Eliza Smith, who I here consider and make my principal heir to my estate, that is to her and her children if she should have any forever, to them and their heirs ; and further, I leave her when she arrives at age in her own right and disposal, fifty thousand dollars, any thing herein contained to the contrary notwithstanding. And I hereby nominate and appoint her third executrix to carry the provisions of this my last will into effect, with full power to execute the same.

"7th. Item. It is my will and desire that in case, and is upon this express condition, that in case of the females, either A. E. Taylor, Ann Janette Smith and Ellen Eliza Smith, should marry, they are to keep, and the property herein and hereby to them devised or given, under their own control as if they were not married, and their husbands to have no power over it whatever, and it must hereinby be distinctly understood to be left to them in their own right forever.

"8th. Item. I hereby appoint Ann Eliza Taylor before named to be trustee and guardian to the three before named children, and to have their entire management of them during her lifetime,

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and also the property above to them devised for their benefit and advantage, to manage as she may deem most proper. I also herein and hereby appoint her after the death of my wife, second executrix, to be duly authorized and empowered to take the sole and full control of all my property agreeable to the letter and spirit of this my will and testament, and to carry the provisions of the same and intentions into effect.

"9th. Item. In case the child before named, Ellen Eliza Smith, should die without leaving issue children, issue or heirs of her body, then and in that case and in no other, I give devise and bequeath the whole and all the remainder and remainders, reversion and reversions, rents, issues and profits of all and the whole of my estate, that may then remain, for ever unto all my paternal and maternal cousins, being my only legal heirs, and their children or grand or great grandchildren, the children of or grand or great grand children surviving, to take the part or share of the parent or parents deceased, and all to take as tenants, that is as joint tenants, any cousin of mine dying without leaving issue, their part or share to go to the surviving cousin of mine of the full blood, or their children grand or great grandchildren as the case may be."

The testator left his wife surviving, but he left no descendants. His widow proved his will in November, 1835, and possessed herself of the estate, which she held until her death on the 30th of January, 1840.

In the meantime Ann Eliza Taylor had married William Cairns, Jr., and on the death of Mrs. Rapelje claimed by virtue of the will to receive and have the rents, issues and profits of the whole real and personal estate during her life; qualified as executrix pursuant to the will; and possessed herself of the property.

A tract of about one hundred acres in the outskirts of the city of New York, called the Glass House Farm, composed a part of the real estate. This farm was largely assessed for the expenses of opening streets and avenues through it and in its vicinity, and for other improvements occasioned by the rapid growth of the city. Many of these assessments, and some taxes which

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were imposed during the lifetime of Mrs. Rapelje, were left unpaid; together with some of those which accrued subsequently.

Of the personal property, a large amount consisted in bonds and mortgages.

William P. Taylor, named in the will, died intestate, leaving no issue, before this suit was commenced.

George Rapelje left a great number of distant collateral relatives, the descendants of his grandfather's brother and sister.

The bill alleged that the devises and bequests in the will were void for various reasons. That the real estate was exposed to be sold for the unpaid taxes and assessments, through the omission of the respective executrixes to apply the rents and profits to their payment. That the personal estate was liable to be wasted in the hands of Mrs. Cairns. That the complainant, with William P. Powers, and seventeen other persons who were named as defendants, were heirs at law and next of kin of the testator. . And that many other persons whose names were unknown to the complainant, claimed to be such heirs at law and next of kin.

The bill prayed that the will might be declared void, and be set aside, and that the complainant and the other heirs at law and next of kin on the paternal side, might be declared seised of the real estate and possessed of the personal property of George Rapelje; and if the life estates of the widow and of Mrs. Cairns were sustained, then that the unpaid taxes and assessments should be discharged out of the rents and income of the whole estate; and that the personal property should be secured so as not to be wasted or lost.

Cairns and his wife, Ann Janette Smith, Ellen Eliza Smith, and the persons in the bill described as heirs and next of kin of George Rapelje, were made parties to the suit. The two Miss Smith's, being infants, answered by their guardian *ad litem*.

Cairns and wife, in their answer, insisted on the validity of the will in all its parts, and that the court had no jurisdiction to construe it or decide on its effect, at the suit of the complainant. They stated that they had paid the taxes which Mrs. Rapelje left unpaid; but denied that they were required to apply any of the rents, issues or income of the property to the payment of

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those taxes or the assessments which she omitted to pay. And they denied that there were any taxes unpaid which Mrs. Cairns ought to pay. That the city improvements had much injured the use and enjoyment of the Glass House Farm, and were a positive loss and great detriment to Mrs. Cairns life estate in that farm. They denied that the personal property was liable to be wasted or lost.

During the pendency of the suit the parties in interest procured the passage of a law, by which this court was authorized to decree a sale of real estate to pay taxes and assessments where several persons had estates therein; and to compel an equitable apportionment. (Laws of 1841, ch. 341, p. 325.) Under this statute, Cairns and wife filed a bill against Emmons, the Miss Smith's and the parties claiming as heirs of Rapelje so far as they were known; and obtained a decree under which three or four hundred lots of the Glass House Farm were sold, and the unpaid taxes and assessments were satisfied out of the proceeds, before this cause was brought to a hearing.

The cause came on to be heard on the pleadings and proofs.

N. Dane Ellingwood, for the complainant.

Jona. Miller, for Cairns and wife and A. and E. E. Smith.

W. Curtis Noyes, for Powers and others.

THE ASSISTANT VICE-CHANCELLOR.—This bill cannot be sustained for the mere purpose of giving a construction to the will of George Rapelje. A decision of the legal questions involved in its construction is not within my province, unless those questions arise incidentally in this court in the exercise of its legitimate powers, and where the court has obtained jurisdiction of the case for some other purpose. (*Bowers v. Smith*, before the Chancellor.)^(a)

(a) Since reported, 10 Paige, 193.

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There are two grounds of jurisdiction which are pressed by the counsel who desire a judicial construction of the will.

First. Assuming that the devise to Mrs. Cairns is to be maintained, she as the tenant for life of the Glass House Farm, received her estate charged with the payment of a just proportion of the assessments then outstanding upon the various portions of that farm; and as such tenant is bound to pay a just proportion of the assessments which have since been imposed, and which hereafter may be imposed thereon.

In connection with this, it is urged that the peculiar circumstances of the property imperiously require that its ownership should be ascertained and declared, long before any of the future estates created by the will can vest in possession; or if those are void, before the heirs can become seised in possession so that their estates will be available for the protection of the property. And that the whole estate which is of great value, will be utterly lost to the owners, by reason of the heavy assessments for urban improvements to which it has been and will be exposed.

The proceedings in the suit of *Cairns and wife v. Emmons and others*, instituted subsequent to the filing of this bill, forcibly illustrate the argument arising from the assessments.

In respect of Mrs. Cairns's life estate being liable to a portion of the assessments, she admits her liability as to those which have been imposed since her estate vested in possession, but denies any liability for any part of the prior assessments.

Second. The other ground of equitable jurisdiction relates to the personal estate alone, and is addressed to the taking an account of the same and its preservation for those entitled after the death of Mrs. Cairns.

I will first look into the case upon this point.

The testator devised and bequeathed, immediately after the death of his wife, the whole income, rents, issues and profits, of all his estate both real and personal, to Ann Eliza Taylor, (now Mrs. Cairns,) for and during her natural life.

This gift is unquestionably valid, whatever may be the fate of the subsequent limitations attempted to be made in the will.

The complainant claiming to be one of the heirs at law and next of kin of the testator, and insisting that all those limitations

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are void, alleges that Mrs. Cairns, the tenant for life, has possessed herself of a large amount of bonds, mortgages and other personal estate of the testator, which he is apprehensive will be wasted or squandered, and which he prays may be secured for the benefit of the next of kin.

It is well settled, that such a bill will be sustained, where there is proof of waste, or of danger of waste, to the property. And in the absence of such proof, the court will enforce the tenant for life to make an inventory of the specific property bequeathed, so that those in remainder may be enabled to identify it, and enforce its due delivery when their right to its possession accrues. (Jeremy's Eq. Jur. 350 to 353; 1 Story's Eq. Jur. § 604; 2 *ibid.* § 843, 844; *Covenhoven v. Shuler*, 2 Paige, 122, 132; *Slanning v. Style*, 3 P. Will. 336; *Shirley v. Ferrers*, 1 *ibid.* 5, note by Cox; *Leeke v. Bennet*, 1 Atk. 471; *Bill v. Kinaston*, 2 *ibid.* 82.)

Mrs. Cairns is now the executrix of the will, and she does not traverse the charge in the bill that she holds such personal estate, but she denies that it is liable to be wasted or lost.

The court having jurisdiction of the subject matter for the purpose stated, it is necessary in order to exercise it in favor of the complainant, that his title to the future enjoyment of the property should be admitted or proved. (*Brown v. Dudbridge*, 2 Bro. C. C. 321; Jeremy's Eq. Jur. 350; 2 Story's Eq. Jur. § 1490.)

The complainant's title is fully stated in the bill, but it is not admitted in the answer of Cairns and wife. And as he claims adversely to the infant defendants, he must maintain his title by proof as against them, even if the adults had expressly admitted it. In this aspect of the case, the infants were necessary parties to the suit; for the complainant seeks relief, and a declaration of his title in a specific fund, in the hands of Mrs. Cairns, which fund by the will is given to the infants.

His title is to be established, first by proof that he is one of the next of kin; and secondly by convincing the court that the bequests in the will to these infant defendants are void and therefore are no obstacle to his right of succession.

The pedigree of the complainant as one of the next of kin and heirs at law of the testator is sufficiently proved.

It remains to consider the provisions of the will bequeathing the property to Janette and Ellen Eliza Smith.

The testator first gives a life estate in the property, both real and personal, to his wife; with a remainder therein for life to Mrs. Cairns. The legacies which are payable after the death of his wife, do not affect this question.

He then creates a joint tenancy for life in behalf of W. P. Taylor and Janette and Ellen Smith. Next he gives the residue of his estate to Ellen Smith and her children, (if she should have any,) forever. But this bequest is presently qualified by a provision that in case she should die without issue or heirs of her body, then the whole of his estate remaining is to go to his paternal and maternal cousins and their descendants as joint tenants, and with cross remainders between them.

There is also a bequest of fifty thousand dollars to Ellen Smith, when she arrives at age, in her own right and disposal, any thing in the will contained to the contrary notwithstanding.

By the revised statutes, the absolute ownership of personal property cannot be suspended by any limitation or condition whatever, for a longer period than during the continuance and until the termination of two lives in being at the death of the testator. (1 R. S. 773, § 1.)

Here the absolute ownership is in the first instance suspended during the two lives of Mrs. Rapelje and Mrs. Cairns. The subsequent limitations therefore cannot be supported, unless upon the death of Mrs. Cairns they will inevitably devolve the personal property upon some person or persons whose right thereto will be absolute and unqualified. This cannot be said of any one of the subsequent gifts of the bulk of the estate. If on the death of Mrs. Cairns, Janette and Eliza Smith are living, they are to succeed for their lives and the life of the survivor. During the continuance of this limitation, the absolute ownership would still be suspended. And if W. P. Taylor had survived his mother, as the testator contemplated, this suspense of the ownership would have continued until his death also.

In short, as to the *corpus* of the estate, there could be no abso-

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lute owner of the property until after the death of Mrs. Rapelje, Mrs. Cairns, W. P. Taylor, Janette Smith and Ellen Eliza Smith; when if the latter left issue, the estate would vest in such issue. If on the other hand, she should die without issue, there would still be the contingent remainders to be disposed of, which the testator limited to his remote relatives.

Thus in no event could the personal property vest absolutely, until after the termination of five lives in being at the death of the testator.

All the limitations of the mass of the personal property which were to take effect after the death of Mrs. Cairns, must therefore be declared void.

The bequest of fifty thousand dollars, stands upon different ground, because Ellen Smith was to take that absolutely, and it was not affected by the subsequent restriction attached to the principal estate upon her death without issue.

This bequest is given to her "*when she arrives at age*." She was about nine years of age when the testator died.

It is very clear that this was not a vested legacy. It is by its terms, as well as by the settled rules of law, conditional upon her attaining the age of twenty-one years. And if she should die before "*arriving at age*," this legacy would lapse. There is no gift of the interest for her benefit in the meantime, either directly or indirectly. On the contrary, the testator expected that Mrs. Cairns would maintain her, until her life estate in the principal property would commence.

Not only that, but this legacy is given in the clause wherein he disposes of the principal estate remaining after the termination of the life estates of W. P. Taylor and Janette and Ellen Smith; and it admits of serious doubt, whether the legacy would vest in possession in Ellen on her arriving at the age of twenty-one years, if either Janette or W. P. Taylor were then living.

It therefore stands unqualified and alone, a gift *when she shall arrive at age*; and must be treated as a contingent bequest. (*Hanson v. Graham*, 6 Ves. 239; *Knight v. Knight*, 2 Sim. & St. 490; *Murray v. Tancred*, 10 Simons, 465; Lowndes on Legacies, 167.)

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In the most favorable view that can be taken of this legacy of \$50,000, the absolute ownership of it is suspended during the lives of Mrs. Rapelje and Mrs. Cairns, and also until it shall be ascertained whether Ellen Smith will attain the age of twenty-one years. So that it *may* be terminated, and the legacy vest absolutely in remainder, within the two lives in being at the testator's death. So it is evident that the suspense *may not* be terminated within these two lives. One of those lives has lapsed, and Ellen Smith is not yet of full age.

The inflexible rule derived from the revised statutes is, that the power of alienation in the case of real estate, and the absolute ownership of personal property, shall not by any contingency or possibility be suspended beyond the prescribed period. Therefore it is not legal to limit a legacy upon any contingency that might extend beyond two lives in being, unless by a provision that shall terminate the suspense upon the lapse of such lives. (*Hone's Executors v. Van Schaick*, 20 Wend. 564; *Irving v. De Kay*, 9 Paige, 521.)

The gift of the \$50,000 cannot be maintained, and must share the fate of the ultimate limitations of the principal part of the estate.

There is no good reason for assailing the life interest of Mrs. Cairns in this property. It is not like the case where the testator in distributing his estate amongst his children, has made some devises which are good and some which are bad; and the vacating of the latter would not only frustrate his whole plan, but do rank injustice, if the good were permitted to stand. The bequest to Mrs. Cairns is wholly independent of all the others, and so far as the evidence before me shows, made upon an entirely distinct cause and motive. I have no reason to believe that the testator would have omitted this bequest, if the three subsequent legatees had died before he made his will. I have more reason to think, that in such an event, he would have greatly enlarged his gift to her.

The charge upon her bequest for the support of those three legatees, is in harmony with the postponement of any direct gift to them until after her death. Instead of the failure of their bequests furnishing a ground for overturning that to Mrs. Cairns;

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it shows a greater necessity for maintaining the latter, so that the infant legatees may not be left wholly destitute, and the testator's intended kindness to them, utterly frustrated in all its aspects.

There is no trust to be set aside in this will, of which the provision for Mrs. Cairns forms a part, or with which it is inseparably or intimately connected. It stands as much detached from the void bequests, as if it were a legacy to a friend or a servant.

I have decided upon enough of the provisions of the will, to reach the point, that the complainant as one of the next of kin, is entitled to a share of the personal estate of George Rapelje, immediately upon the death of Mrs. Cairns.

There is some obscurity in regard to the bequest of \$10,000 in the fourth article of the will, to the children of Mrs. Cairns. There are no such parties before me, and I will not express any opinion as to its validity.

The bequest to W. P. Taylor's children, in the same article has lapsed, if it were ever valid. That to the children of Janette Smith, is apparently postponed until after the life estates created by the fifth article, and its validity is questionable. The point was not raised at the hearing. If necessary to determine it in this suit, I will hear counsel upon the question.

The bequest to Mrs. Cairns, is not of specific chattels merely, but it is of the income, interest, issues and profits of the personal, as well as the real estate. In such cases the court directs the personal property to be sold and converted into money, and that an account be taken of the personal estate, and the whole invested in permanent securities. (*Covenhoven v. Shuler*, 2 Paige, 132, 133.)(a)

(a) In *Johnson v. Johnson*, 2 Collyer's Cas. in Chy. 441, March 6th, 1846, the testator gave the remainder of his property consisting of a bond debt, a leasehold estate and insurance and other stocks, to his wife, for her use and benefit during her life, and at her decease to be given to his children equally; and in case of her marrying again, the will directed her to appoint trustees of his property for the benefit of his children, so that the same might not be wasted. The wife claimed the residuary property in specie, during her life. Sir Knight Bruce, V. C. decided that she was not entitled to retain it in specie, though he left it to the master to inquire

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There must be a decree accordingly in this case, and it will direct the payment of the income to Mrs. Cairns during her life.

In respect of the real estate of the testator. There is no need of a decree declaring what Mrs. Cairns admits and what the law clearly establishes, that her life interest is subject to the payment of *some share* of whatever assessments may be made upon the property.

The decree cannot ascertain and declare in advance, what proportion of the future assessments she shall pay as tenant for life of the rents and income.

The controversy about her liability to pay any part of the assessments which were imposed in Mrs. Rapelje's lifetime, is no longer important, because those assessments have been paid by a sale of portions of the estate, under the late statute and the decree of this court, in *Cairns and wife v. Emmons and others*, founded upon it.

I do not perceive any point in regard to the real estate, which it is really necessary, or even important that I should decree in this suit; and it would therefore be improper for me to volunteer an opinion as to the validity of the various devises of the real estate subsequent to the termination of Mrs. Cairns' life interest.

The similarity of the statutory provisions which make the gifts of real and personal property void in certain cases, does not warrant a declaration in regard to the former in this suit.

Decree accordingly, as to the personal property of George Rapelje.

whether with a view to the interest of all parties, a conversion might not be dispensed with.

In *Pickup v. Atkinson*, 4 Hare, 624, March 28, 1846, after a specific gift of two leasehold houses to the testator's wife for life, with remainder over, he bequeathed the rents, profits, dividends and interest of all the residue of his property, to his wife for life, and after her decease, he gave the whole of such residue to his nephews and nieces. There was no freehold estate, and the residue consisted of leaseholds, government annuities and insurance shares. Sir James Wigram, V. C., in an able opinion, held that the widow was not entitled to the enjoyment of the residue *in specie*, but that the same ought to be converted. These two cases are also reported in 10 London Jurist Rep. 279, 303. See also *James v. Gammon*, before Sir Knight Bruce, V. C., January 30, 1846, 15 Law Journal Rep. N. S., Chy. 217; *Collins v. Collins*, 2 M. & K. 703.

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STEWART and WHITEWRIGHT, Executors of T. Chambers, v. CHAMBERS and others.

A testator having a wife and two small children, and also four adult children by a former wife, after giving legacies to the latter, directed his executors to convert all the residue of his estate and invest it in stocks or on real security, so to remain until the death or marriage of his wife, and until the youngest child should become of full age. Out of the interest and income, they were to pay his wife an annuity half yearly so long as she remained sole, and to his two infant children each an annual sum in half yearly payments, varying according to their age from time to time. Each was to have £1000 on her marriage; and when the youngest became of age and the widow's annuity ceased, the residue was to be divided equally between them. The will further provided in the mean time, that all the surplus interest and income, after paying the annuities, should be divided among the four adult children, semi-annually. The income of the residue of the estate was insufficient to pay the three annuities during ten years that the widow survived. After her death it was more than sufficient to pay the two infants' annuities.

Held, that the surplus sums then arising, must be applied to the discharge of the arrears of the three annuities which occurred prior to the widow's death, before any of them could be divided among the adult children.

Legacies for support and maintenance of a wife and children, otherwise unprovided for, do not abate with the general legacies.

The direction for a half yearly payment and distribution, was held on the general intent of the will, to be a regulation as to the time of payment to the wife and two minor children, and for a division after they were fully paid. And the testator's intent would be violated by a division of the surplus of any half year, leaving any portion of the annuities unpaid which fell due previously.

But the adults having received a surplus when there were no arrears, would not be required to refund, on the income subsequently becoming deficient to meet the current annuities.

The arrears to the widow became a debt due to her as they respectively accrued, which was a charge upon the income accruing after her death.

An annuity to one of the infants, which on a literal reading of the will was to terminate, on an event that might leave her unprovided for at fifteen, and which did occur when she was twenty; held to continue thereafter in the same manner as her sister's was directed, upon a construction of other clauses in the will, and its general intent.

Legacies directed to be paid in London in sterling money, if paid to the parties here are to be paid at the par of exchange; and if remitted, the executors are to purchase exchange on London for the amount in sterling.

January 20; Feb. 28, 1845.

THE bill was filed in September, 1843, by the surviving ex-

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ecutors of Thomas Chambers, who died in the city of New York on the second day of April, 1829, for a construction of his last will and testament, and for directions in the final disposition of his property. The will was dated on the twenty-second day of February, 1829, and was as follows ;

"I, Thomas Chambers of Lisburn in the county of Antrim, Ireland, now residing in the city of New York, merchant, do make and publish this my last will and testament in manner and form following, that is to say, *First*, I order and direct that all my just debts and funeral expenses be paid as soon after my decease as can conveniently be done.

"Item. I give and bequeath to my friend Alexander T. Stewart, of the city of New York, the sum of two hundred and sixty pounds British sterling money, to be by him distributed among certain persons in Ireland, at his discretion.

"Item. I give and bequeath to my daughter, Catharine McGinnis, the sum of fifty pounds British sterling money.

"Item. I give and bequeath to Elizabeth Chambers of Lisburn, aforesaid, the sum of fifty pounds British sterling money, but in case the said Elizabeth Chambers shall have departed this life previous to the time of my decease or within one year thereafter, without having received the said sum of fifty pounds, then and in either of those cases I give the said sum of fifty pounds to the said Catharine McGinnis.

"Item. I give and bequeath to my son Moses Chambers, the sum of four hundred dollars, lawful money of the United States of America.

"Item. I give and bequeath to my daughter Eliza Barry, the sum of five hundred dollars, lawful money of the United States of America.

"Item. I give and bequeath to my daughter Maria Chambers, the sum of twelve hundred and fifty dollars, lawful money of the United States of America.

"Item. I order and direct my executors hereinafter named, and the survivors and survivor of them and such of them as shall act for the time being, to collect all the moneys due and to grow due to me, or such part thereof as shall be found to be collectable. To sell and dispose of all my personal property, and convert the

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same into cash : to sell and dispose in fee simple, absolutely of all my real estate, and give good and sufficient conveyances in the law for the same, and invest the proceeds of such collections and sales after deducting and paying all my just debts, the legacies above mentioned, and all reasonable and proper costs, charges and expenses, in stock of a permanent and productive nature, or place the same at interest on real security, so to remain until the death or marriage of my said wife, and until my youngest child shall arrive at the age of twenty-one years.

"Item. Out of the interest and income of my estate, I give and bequeath to my beloved wife Mary Chambers, the sum of seventy-five pounds British sterling money per annum, payable semi-annually in London, so long as she shall remain my widow.

"Item. Out of the interest and income of my estate, I give and bequeath to my daughter Isabella Harriet Chambers, the sum of forty pounds British sterling money per annum, payable semi-annually until she shall arrive at the age of fifteen years, and from that time until the death or marriage of my said wife, I give her fifty pounds of like money per annum, payable semi-annually, unless my said daughter Isabella Harriet shall sooner marry.

"Item. Out of the interest and income of my said estate, I give and bequeath to my youngest daughter Mary Grace Chambers, the sum of twenty pounds British sterling money per annum, payable semi-annually, until she shall arrive at the age of ten years, and from that time until she shall arrive at the age of fifteen years I give her the sum of forty pounds of like money per annum, payable semi-annually, and from the last mentioned time until she arrives at the age of twenty-one years, and until the death or marriage of my said wife, unless my said daughter Mary Grace shall sooner marry, I give her the sum of fifty pounds of like money per annum, payable semi-annually.

"Item. In case my said daughter Isabella Harriet Chambers shall marry previous to the time of the final distribution of my residuary estate as hereinafter mentioned, I order and direct my executors to advance to her out of the principal thereof the sum of one thousand pounds British sterling money on the day of her marriage or as soon thereafter as she shall arrive at the age of twenty-one years, when her said annuity shall cease.

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"Item. In case my said daughter Mary Grace Chambers shall marry previous to the time of the said final distribution of my residuary estate, as hereinafter mentioned, I order and direct my executors to advance to her out of the principal thereof, the sum of one thousand pounds British sterling money on the day of her marriage, or as soon thereafter as she shall arrive at the age of twenty-one years, when her said annuity shall cease.

"Item. Until my youngest child shall arrive at the age of twenty-one years, and until the death or marriage of my said wife, I order and direct that all the surplus interest and income of my estate, after paying the legacies and annuities above mentioned be divided between my son Moses Chambers and my said daughters Catharine McGinnis, Eliza Barry and Maria Chambers equally, and in case any one or more of said children Moses, Catharine, Eliza and Maria shall die leaving lawful issue living at the time of his, her or their death, such issue if one solely, if more than one jointly and equally, is to take the share or shares of such surplus income which his, her or their parent or parents would have taken if living, and in case any one or more of them shall die without leaving lawful issue then living, the share or shares of such so dying shall go to and be divided among the survivors of them and the issue of such of them as shall die leaving lawful issue then living, such issue taking the parent's share as aforesaid, such division to be made semi-annually.

"Item. I hereby appoint my friend, William P. Manger, of London, in the kingdom of Great Britain, accountant, guardian of my said daughters, Isabella Harriet Chambers and Mary Grace Chambers, during their minority, and direct their said annuities to be paid to him in London for their use; and for his services therein, I hereby allow him to charge the sum of two hundred pounds, British sterling money, payable and to be paid out of my residuary estate, at the time of the division and before the distribution thereof.

"Item. After my youngest child shall have arrived at the age of twenty-one years, and after my said wife shall marry or depart this life, I give, devise and bequeath all the rest, residue and remainder of my said estate to my said daughters, Isabella Harriet Chambers and Mary Grace Chambers, equally, share and

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share alike, and in case either of them shall then have departed this life leaving lawful issue then living, such issue, if one, solely, if more than one, jointly and equally, is to take the share of his, her or their parent or parents. In case either of them shall then have deceased without leaving lawful issue then living, then, and in that case, the survivor of them, or the issue of one of them that shall then have deceased leaving lawful issue then living, shall take and receive, in addition to her one equal half part thereof, the sum of eight thousand dollars, lawful money of the United States of America, of the share of such one as shall then have died without leaving lawful issue then living, the residue of the share of the one so dying without leaving lawful issue then living, to be equally divided between my said son Moses and my said daughters, Catharine, Eliza and Maria, or the survivors of them, and the issue of such of them as shall then have deceased leaving lawful issue then living, such issue, if one, solely, if more than one, jointly, to take the share of his, her or their parent or parents as if then living. And in case both my said daughters, Isabella Harriet and Mary Grace Chambers, shall then have deceased and neither of them shall have left lawful issue then living, then, and in that case, I give the said rest, residue and remainder of my estate to my said children Moses, Catharine, Eliza, and Maria, and the survivors of them, and the issue of such of them as shall then have deceased leaving lawful issue then living, such issue, if one, solely, if more than one, jointly, to take the share of his, her or their parent or parents as if then living.

“And lastly, I do hereby nominate, constitute and appoint my friends, Alexander T. Stewart, William Whitewright, and John Hall, all merchants, residing in the city of New York, executors of this my will and testament, hereby authorizing and empowering them, and the survivors and survivor of them, and such of them as shall act for the time being to compromise and compound with all my debtors, and submit to arbitration all disputes and controversies that shall arise in the settlement of my estate. And hereby revoking all former and other wills and testaments by me made, I declare this and this only to be my last will and testament.”

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After the signature and attestation clause, was added a paragraph, signed by the testator and which with the will, was attested by three witnesses, in these words, viz :

"Item. For the purpose of having my two daughters, Isabella Harriet Chambers and Mary Grace Chambers, better educated, I will and bequeath to each the sum of twenty pounds, British sterling money, payable semi-annually, in addition to the aforesaid annuities, until each of them arrive at the age of twenty years."

On the 8th of March, 1829, the testator added a codicil to his will, revoking all but five dollars of the legacy which he had given to Moses Chambers.

The testator left surviving, his wife, and two children who were her issue, Isabella aged about ten years, and Mary Grace about one year old. He also left one son and three daughters, the issue of a former wife, to whom were bequeathed legacies by the will; and all of whom were adults.

The executors proceeded at once to convert the estate into money and securities and pay off the debts and legacies, which was accomplished by the 21st of December, 1830, at which time the whole residue of the estate was found to amount to \$12,020 39. The income from this residue was insufficient to pay the three annuities charged upon it by the will in favor of Mrs. Chambers and her two daughters.

Mrs. Chambers died on the 23d day of September, 1839, at which date the unpaid arrears of her annuity were \$968 95. She left a will by which she bequeathed all her right to the annuity and its arrears to her two daughters. At the same date there was in arrear to Isabella, of the full annuities given to her by her father, \$834 02; and to Grace, \$543 28.

After the death of the widow, there was a surplus of income every six months, after paying the accruing annuities to the two daughters. Upon this the question arose, whether these surplus sums should be applied to paying the arrears of former years, due to the widow and Isabella and Mary Grace respectively; or should be divided as they arose half yearly, between the other children under the clause in the will for dividing the surplus income.

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Previous to this suit, Mrs. McGinnis died leaving her husband and five infant children surviving; Mrs. Barry also died leaving her husband and two infant children surviving; Mary Chambers died intestate and without issue; and Moses Chambers died intestate and without issue, leaving a widow.

The guardian named in the will never acted in that capacity; but Isabella and Grace lived in New York with their mother until her death; after which event William Wright, her executor, became their guardian and provided for them.

Some other questions were stated in the bill, as having arisen under the will of Thomas Chambers. Annexed to the bill were the accounts of the executors, showing their whole receipts and payments on account of the income, and of the annuities to Mrs. Chambers and her two daughters.

W. Mitchell, for the complainants, made the following points.

I. Neither Mrs. Chambers' executor nor the children are entitled to have the arrears of the annuities caused by the former deficiency of the income, to be made up from the present surplus beyond the annuities: that surplus by the will goes to the other children of the testator. (*Scott v. Salmond*, 1 M. & K. 363; 2 Williams on Exec. 837 to 841; *Beeston v. Booth*, 4 Madd. 161; *Page v. Leapingwell*, 18 Ves. 463.)

II. The annuity of £50 to Isabella H. Chambers ceased on the death of her mother, and the additional annuity of £20 ceased when she was twenty years of age.

III. The annuities being payable in British sterling and to a guardian in London, and to be paid there, if paid in full, are to be paid with so much of the federal currency as would here be necessary to place the amount of the annuities in London at the respective times of payment, according to the rate of exchange at such times.

IV. Mr. Manger not having acted as guardian is entitled to no compensation.

G. F. Allen, for the defendants Barry, and the defendants McGinnis, made the following points.

I. Isabella and Mary Grace have no claim whatever upon the surplus income accruing from the estate since the death of Mrs. Chambers; because,

1. That surplus is specifically given by the will to Moses, Catharine, Eliza and Maria. The annuities are given "out of the income," and are to be paid "semi-annually;" all the "surplus, interest and income" is to be divided among Moses, Catharine, Eliza and Maria, and such division to be made "semi-annually." The *surplus income* is to be *divided semi-annually*, i. e. the semi-annual surplus is to be divided.

2. The annuities to Isabella and Mary Grace are not given generally, and then made payable out of the income of the estate; but they are specific gifts of portions of that income: "*out of the interest and income of my estate, I give*" &c. Neither are they charges upon the entire aggregate income of the estate, but are gifts out of each year's income of a specific portion thereof. The testator gives "out of the interest and income," a certain sum "per annum," payable "semi-annually." He then directs the "surplus income" to be divided among Moses, &c. Each semi-annual sum is a legacy out of a specific fund, viz: the income of the corresponding half-year, and when that fund fails, the legacy fails with it.

3. The testator contemplated a semi-annual distribution of the income of his estate, and the will makes it the duty of the executors to make a final and complete distribution of the income every half year.

4. The principle contended for by Isabella and Mary Grace would make Moses, &c., liable to refund, had they at any time received any surplus income, and the income of any subsequent year proved insufficient to pay the yearly sum given thereout.

5. Such a claim could not be sustained unless most express provision for it was found in the instrument. (*Scott v. Salmond*, 1 Mylne & Keen, 363; S. C. 1 Cooper Sel. Ca. 46.) The present will contains no such provision, but its whole tenor is to the contrary.

II. The executor of Mary Chambers has no claims upon the surplus income which has accrued since her decease, for the reasons under the first point and also because the testator never

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intended to give her any interest in any income which should accrue from his estate after her decease.

III. The annuities to Isabella and Mary Grace abated in the lifetime of Mrs. Chambers, and cannot be raised above the abated rate.

IV. Isabella's annuity ceased on the death of her mother, viz : 23d September, 1839.

V. The sterling money must be reduced to dollars at the legal par, without any allowance for exchange. (*Scofield v. Day*, 2 J. R. 102.)

VI. One-half of the surplus income should be divided equally among the children of Mrs. Barry, and the other half among the children of Mrs. McGinnis.

The counsel also referred to *Beeston v. Booth*, and *Page v. Leapingwell*, before cited, and to *Dyose v. Dyose*, 1 P. Will. 305.

C. O'Connor, for Isabella H. and Mary Grace Chambers, and for Mrs. Chambers executor, made the following points :

I. The primary, general and leading intent of the testator was to secure to his widow and her children an ample support out of the income, and to secure to the latter the whole capital, as soon as they should attain a proper condition in life to enjoy it. The gifts over to the elder children are trivial or remote. The gift to the elder children of a surplus of income, possibly to arise during an indefinite interval, is a disposition merely incidental and secondary, which should not be permitted to interfere in any degree with the primary intent.

1. No particular portion of income is given to the elder children, nor any certain term allowed for the accruer of their *chance*.

2. It is clear that the testator only designed for their benefit, such accidental surplus as might perchance arise, after affording what he deemed a complete and adequate support to his widow and her children.

3. The only evidence of care or favor in respect to them on this head, is contained in the provision for half-yearly distribution. This was a formula naturally adopted from imitation

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of the precedent direction so to pay the other children. The testator did not apprehend depreciation in later years.

4. The repeated use of the word "*surplus*" in reference to the portion of income allotted to the elder children; as also the direction to "*pay*" the annuities, and to "*divide*" the surplus income, are circumstances in support of the claim of the younger children.

The cases cited under this point, were *Lewin v. Lewin*, 2 Ves. Sen. 415; *Farmer v. Mills*, 4 Russ. 86; 2 Williams on Exec. 837.

II. The arrears of the widow's annuity should be paid to her administrator, and the arrears of the annuities of the younger children should also be paid out of the surplus of the present income, before any distribution to the elder children.

III. Isabella H. Chambers is entitled to receive her annuity of £50 until she shall become entitled to the £1000, or to her whole share of the capital. (*Sherratt v. Bentley*, 2 M. & K. 149.)

THE ASSISTANT VICE-CHANCELLOR.—No one can read this will without being satisfied that the great and principal intent of the testator, was to provide for the support of his wife, and the maintenance and education of his two infant children. His other children appear to have been adults, and are with one exception, provided with legacies, which have been paid in full.

The gift under which their representatives now claim, is of the surplus interest and income of the estate, *after paying the legacies and annuities* previously bestowed. Those annuities being for support and maintenance, it would be doing violence to the plain intent of the testator, to declare that there was a surplus income to be divided, as long as any portion of the annuities remained unpaid. This was my first impression of the case, and subsequent reflection has confirmed it. The argument against making good from the surplus of later years, the arrears of the annuities which accrued in the earlier stage of the administration, rests wholly upon the fact that they were payable out of the interest and income, and were to be paid semi-annually.

In truth, it stands upon the latter provision, because if there were a mere direction to pay out of the income, certain sums,

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without reference to time; the whole of those sums would ultimately be payable, if the income ever became adequate.

Then as to the effect of the clause that the annuities shall be paid half yearly. It is clearly a direction to the trustees regulating the time of payment, so as to provide for the seasonable support of the wife and infant children. It is not a direction that at the end of every six months, they shall strike a balance, and dispose of the income then received, without reference to the past or the future; if nothing had been collected, then to pay nothing, for the preceding six months annuities, even if in the ensuing six months the income should come in to double their amount. This cannot be a reasonable construction of the will.

Yet it is the construction for which the representatives of the elder children contend. They insist that the trustees were to apply the income, divide it and close it finally and forever, at the end of each six months. If at that time, there were less than enough to pay the annuities, the wife and young children were to receive what there was, in full for that six months, and lose the residue. And if at the end of any half year, there were a surplus after paying the annuities, that surplus was to be divided at once among the residuary legatees of the same under the will; although the annuitants during the year next previous had not received half of their annuities.

These inequalities in the half yearly income would necessarily be frequent. If the estate stood in bank or insurance stocks, some casualty in business might prevent a dividend for a year. If invested on mortgage, the death of the mortgagor, his bankruptcy, or some other event, might delay the payment of interest for a considerable period.

So in converting into money and investing an estate consisting of bills receivable or other debts due, there would inevitably be great and unequal delays in realizing the same and putting them out upon securities producing a stated income.

The construction claimed, would throw the burthen of all these contingencies upon the widow and infant children, inflicting upon them a heavy loss and a straitened maintenance; and the legatees of the surplus would ultimately become the gainers to the amount of the loss thus sustained by the annuitants.

The will does not give the annuities out of *each year's specific income*, as was urged by the counsel claiming the surplus. They are given out of the whole interest and income of the estate; and the residuary legatees are to have nothing until after the payment of all the annuities.

There would be no surplus income to divide, according to the terms of the will, until all the annuities were paid; and payment of all, is only accomplished by full payment.

This obviates the objection raised, that under the construction claimed by the two infants, the legatees of the surplus would be liable to refund what they had received in a productive half year, to make up the deficiency of some less fortunate term of six months.

The trustees could not divide any surplus on this construction, until all the annuities were paid in full. When they were thus paid the will became imperative that the trustees should divide the surplus, and whatever the legatees received on such a distribution, would be their own, rightfully paid, and not revocable. If in the ensuing six months, there should be a deficiency, the annuitants would necessarily wait until it could be made up from the future income.

The established principles of construction, it appears to me, sustain the view which I have taken upon the intent of the testator. A residuary legatee cannot call upon a general legatee to abate. (2 Will. on Exec. 837; 1 Roper on Leg. 355.)

And annuities, given for the maintenance of a wife and children who are otherwise unprovided, which is precisely this case, are held not to abate in proportion with the general legacies. (*Lewin v. Lewin*, 2 Ves. sen. 415;) a decision which goes far beyond what is requisite to restore the arrears to these two children.

In *Beeston v. Booth*, (4 Madd. 161, 170,) the Vice-Chancellor speaking of legacies similar to those of the residue here, says, "they are expressly given out of such uncertain residue or surplus as shall remain after providing for the two first sets of legacies, and the intention of the testator that they are to be payable only in case there be a surplus, is too plain to admit of question."

And in *Farmer v. Mills*, (4 Russell, 86,) the Master of the Rolls gave his opinion, that where there was a direction to pay annuities out of investments, and residuary bequests were then given, and the estate fell short; the arrears of annuities were to be made up on some of the annuitants dying, before the residuary legatees would be entitled.

Both of these cases, together with *Page v. Leapingwell*, (18 Ves. 463,) were cited by the legatees of the surplus, but I do not think the cases sustain their position.

The decision of Vice-Chancellor Shadwell in *Boyd v. Buckle*, (10 Simons, 595,) is a strong authority for the payment of these arrears. In that case, the testator by his will, after reciting that he had settled on his wife for her life at their marriage, the yearly rent of a leasehold estate and the dividends of £4000 of stock; that the leasehold estate on her surviving him would form a material part of her income; and that the lease under which he held the same might expire in her lifetime; directed his trustees in that event, *out of and from the dividends and interest arising from a sufficient part of his personal estate, at their discretion*, to pay to his wife, so much per annum as would be equivalent to the rent so lost by such lease having expired. He also gave to her an immediate legacy of £500; and gave to his trustees certain stocks, of which the interest was to be paid to her. After giving some pecuniary legacies to others, he bequeathed to the trustees all his remaining personal estate, to be invested, and to accumulate the income until the lease expired; and then upon the lease expiring, during the residue of his wife's life, to pay to her the annual income of the investments and of the accumulations; and after her death the residuary fund and accumulations, if any, were to go the testator's grandchildren who were living at his decease, equally. The lease expired in the lifetime of the widow, about three years after the testator's death; and the annual income of the residuary fund including therein the accumulation, was not sufficient to make good to her the loss of income occasioned by the termination of the lease. It was held that she was entitled to have the deficiency of her income made good out of the capital of the residuary fund.

The case of *Dyose v. Dyose*, (1 P. Will. 305,) decided by

Lord Cowper, and cited by the legatees of the surplus, was disapproved by Lord Thurlow in *Fonnereau v. Poynts*, (1 Bro. C. C. 478,) and by Sir William Grant, in *Page v. Leapingwell*, (18 Ves. 466.)

The legatees relied much upon *Scott v. Salmond*, 1 M. & Keen, 363, decided by Sir John Leach, and affirmed by Lord Brougham. But it will be seen that the judgment of the latter, was placed upon the ground that the testator set out with a knowledge that there was to be a deficiency in the rents of the real estate paying the two annuities charged on those rents, and then gave over the surplus of the rents that there would be whenever the one annuitant died, "after payment of the annuities for the time being in existence payable out of the rents," to a third person. And by the will he called in aid his personal estate, which he erroneously supposed was ample, to make good both of the specific annuities. In that case the rents had never proved inadequate to pay all that the testator intended that they should pay.

My conclusion is that the trustees must make good from the surplus which has accrued since the death of Mrs. Chambers, the whole amount of the unpaid annuities to Isabella and Grace Chambers.

A distinction was drawn between these arrears, and the unpaid annuity of Mrs. Chambers, on the ground that the testator never intended to give her any interest in any income which should accrue after her decease.

This is probably true, as to any actual intention present in his mind, because he evidently supposed his estate was much larger than it proved to be. At the same time, I am persuaded from the language of the will, that if he had anticipated the existing state of things, he would have imperatively enjoined such payment.

What does the will declare when applied to that state of things?

The testator's primary and great intent was a suitable provision for his wife and two children, as I have already stated. To that end, he gave these annuities payable half-yearly. He intended to make a very ample provision for their payment, because he charged them upon the whole income of all his residu-

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ary estate. The clause for the payment of \$8000 out of the one-half of this residue on the death of either of these two children without issue, shows that the testator supposed the whole residue would produce an income considerably exceeding the aggregate annuities.

He did not direct a sum or sums sufficient to produce these precise incomes, to be invested, and then give such incomes to the wife and children; thereby limiting them to the income of such sums, whether they continued to produce the same revenue or not.

But the testator intended to secure to each of them, a fixed yearly sum; absolutely, and without reference to any contingency, or any particular investment or fund which was to produce it.

It is the bequest of an annuity, and as such, vested in Mrs. Chambers a right to receive it every six months, and at the end of each six months the amount then payable became a debt due to her, to be liquidated out of the future income, if it should ever prove adequate for that purpose.

The cases of *Davies v. Wattier*, 1 Sim. & St. 463; *May v. Bennett*, 1 Russ. 370; and *Arundell v. Arundell*, 1 Mylne & Keen, 316, illustrated the extent to which equity will go to maintain in their integrity, provisions of this description.

I think I shall best effectuate the whole intention of the testator as it is derived from this will, by declaring that the entire annuity to his widow, as well as those to his two infant children, shall be paid in full, without abatement, before any surplus income can be distributed among the residuary legatees of such surplus.(a)

(a) In *Foster v. Smith*, 2 You. & C. New Cases, 193, where trustees were directed to pay out of the rents and profits of freehold and leasehold estates, an annuity of £200 to the widow during her life, in equal quarterly payments; the income being insufficient for the payment of the annuity. Sir Knight Bruce, V. C., held that the arrears due at the widow's death were chargeable on the corpus of the estates. See also *Cassamajor v. Pearson*, 8 Cl. & Fin. 69, where on a different state of facts from those in the text, it was held that the arrears in any given year, were not to be made up out of the surplus of any succeeding years.

Isabella H. Chambers claims that her annuity of £50 is to be paid to her until her marriage, or until her sister Grace becomes of full age. The legatees of the surplus income insist that this annuity ceased on the death of Mrs. Chambers.

The bequest is singularly expressed. Isabella was about ten years old at the death of her father. The will first gives her an annuity of £40 until she shall arrive at the age of fifteen, and from that time until the death or marriage of her mother, it gives to her £50 a year unless she shall sooner marry.

Thus on this clause alone, it is apparent that if the mother had married or died before Isabella became fifteen, the annuity of £50 would never have come into existence, and she would have been left utterly destitute at that tender age. The will gave her no part of the capital until her marriage; and unless she married, it gave to her no part of the capital absolutely, so that she could sell or dispose of it in anticipation of the time of its distribution. She might never have a proposal of marriage. So upon the construction claimed against her, we have the extraordinary spectacle of a father, able and apparently anxious, to make a comfortable provision for his young daughter first by a suitable income from time to time, and finally by giving to her half of his estate, in case she survived till the time fixed for its division; yet making a will which, on two contingencies that were both in his mind, and were both likely to occur, would leave that daughter at the age of fifteen without a shilling for her support, and deprived of all benefit from her father's estate for the ensuing fifteen years, unless she could obtain a husband in the mean time and thereby entitle herself to the £1000 provided to be paid to her on her marriage.

It is impossible to believe that this was the actual intention of the testator. Still if the language of the will, when construed upon all its parts, expresses that intention, it must needs be so declared and enforced.

There is another singularity upon this construction, which is that the testator should have placed the cessation of his daughter's annuity upon two such events, as the marriage and death of his widow. He seems to have thought that his wife might marry again, and he cut off her annuity upon her so doing. He could

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scarcely have failed to perceive that such second marriage, while it deprived her of the means, would also diminish her disposition, to aid in the support of her children. And her death would necessarily cut off all aid to her children, if her annuity should continue till that time.

We are led to expect in his will some guide to his intention, farther than that contained in the bequest upon which I have commented.

In the general scope of the will, there is no indication of any design on the part of the testator to do less for Isabella, than he does for his youngest daughter Grace. Their annuities are the same during the corresponding periods of their youth; the marriage gift is the same to each; and they are to share equally in the ultimate distribution of the estate. Every clause in the will indicates pure and entire equality between them, unless it be disturbed by the construction asked by the surplus legatees.

Now the provisions as to Grace are these. She is to have £20 annually till she is ten years old, £40 from thence till she becomes fifteen, and £50 from thence till she becomes twenty-one, and until the death or marriage of the widow, unless Grace should sooner marry.

Thus a sure income was provided for her till her marriage, or till the time of distribution. Following this in the will, is the provision for the marriage of Isabella; which is, that in case she marries previous to the time of the final distribution, the executors are to advance to her out of the capital £1000 on the day of her marriage, or as soon thereafter as she shall arrive at the age of twenty-one years, *when her said annuity shall cease*. This clause shows that there was no intention to have the annuity cease upon any contingency connected merely with the death or marriage of Mrs. Chambers.

The provision for the marriage of Grace, succeeds that for Isabella, and is in the same words.

The codicil furnishes further and conclusive evidence that the testator had no thought of cutting off Isabella's income at fifteen, in case his wife died or married before she attained that age. It declares that for the purpose of having his two daughters, Isabella and Grace *better educated*, he wills and bequeaths to each

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£20, payable semi-annually, *in addition to the aforesaid annuities*, until each of them arrives at the age of twenty years.

The codicil declares an intention that the annuity of £50 before given to Isabella, should not be determinate on the death or marriage of the wife of the testator. The only other events with which it was connected in the will, were the payment of her marriage portion and the division of the estate.

I think the true construction of the will is this :

Isabella, exclusive of the £20 in the codicil, was to have £40 annually till she became fifteen ; and £50 annually from thence until the division of the estate. But if she married before that time, then upon her marriage if she were of full age, or on her becoming twenty-one years of age if she married while a minor, she should receive £1000 from the executors, and thereupon her annuity should cease.

The testator as a British subject, directing his annuities to be paid in London, doubtless had in view the English rate of interest ; and the interest at five per cent. on £1000, would continue Isabella's income after her marriage, without alteration, until the time of the final division.

Probably there was an accidental omission of the words "until my youngest daughter Grace shall arrive at the age of twenty-one years and," before the words "until the death or marriage of my said wife," in the paragraph of the will which grants the annuity to Isabella. These words would make it precisely like the subsequent gift of the like annuity to Grace. The intention is sufficiently apparent from the residue of the will, to enable the court to uphold the legacy and carry out the design of the testator.

I refer to *Sherratt v. Bentley*, (2 M. & Keen, 149,) for an apt instance of the rejection of words used in a will, which were incompatible with the general intention collected from the whole will.

In my judgment, Isabella Chambers is entitled to receive her annuity until her marriage, or until the final division of the estate, if she shall remain unmarried till that time.

The annuities are to be paid in London in British sterling money. Payment here for legatees there, in the currency of the

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United States, will not be a compliance with the testator's direction. It is not like the case of a creditor suing in our courts for the recovery of a debt. In those cases the money recovered becomes payable here. Here the trustees are asking the direction of the court in the discharge of their trust; and they can discharge this part of it, only by paying the sums directed, and in the manner directed, by the will. In order to make such payment, they must apply so much of the fund as is requisite to purchase exchange on London for the amount there payable. If payment is to be made to parties here, it must be in the pound sterling at par.

Decree accordingly, with costs to the respective parties out of the fund.

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G. asserted claims against two brothers who were partners, as well in their own right, as executors of his father's estate, and a legal controversy was likely to ensue. D., his mother, who was the assignee of two bonds given by G. to the two brothers, two years before her death attached to the bonds a writing signed by her, expressing her desire to prevent such a controversy after her death, and directing the bonds to be cancelled on G.'s executing a discharge of all demands to his father's executors and to each of his brothers and sisters; and if he should refuse, then the bonds were to be made a set-off against any such demands, but they were never to be put in suit against him. The bonds and writing were in D.'s possession at her death, and there was no evidence of their having ever been out of her possession, or of any formal delivery of the writing by her.

Held, in a suit against her administrator, that the bond should be delivered up to G. on his executing the discharges specified in the writing signed by D.

Also that the instrument could not be sustained as a *donatio mortis causa*, nor on the ground of an appointment, or as a direction to her legal representatives; but that it was rather the discharge or forgiveness of a debt.

It seems there is a distinction between donations unaccompanied by delivery, where the object is to forgive a debt; and those in which the donor's apparent intent is to transfer property, either in his possession or by means of his own note or bond. An averment of the *execution* of a deed or writing, imports *delivery*, as well as signing.

The strong expressions in the books of the common law, against sustaining dona-

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tions, either *mortis causa* or *inter vivos*, without tradition or actual delivery, are owing to such gifts being usually claimed on parol evidence.

Where the intent of the donor is proved under his own hand, a delivery will be presumed from slight circumstances.

The retention of the deed or instrument by the donor, does not impair its validity, unless there be clear and decisive proof that he never parted or intended to part with its possession.

Though courts of justice ought never to strain a point of law to relieve a case of hardship, or to support a claim however meritorious; equity should strive to validate an instrument, evidently designed to be made effectual by the party, which proceeded not merely on a good consideration, but on that of settling and avoiding family broils; if the principles of law, or the force of judicial decisions will sanction a decree in its support.

January 17; March 7, 1845.

THE bill in this cause was filed October 5th, 1842, by George Brinckerhoff against John L. Lawrence, administrator of Dorothea Brinckerhoff, and James L. Brinckerhoff as survivor of himself and Abraham Brinckerhoff, Jr. Mrs. B. was the mother of George, Abraham and James. The object of the suit was to have delivered up and cancelled, two bonds executed by George B. to Abraham and James; one for \$3258 27, dated March 3, 1823, and the other for \$1900 dated May 10, 1823; both of which were payable on demand, with interest half-yearly.

It appeared that in 1823, and for several years before, Abraham and James were partners in trade in the city of New York, under the name of Abraham Brinckerhoff, Jr. & Co., and that the complainant had many dealings and transactions with the firm, and for several years was their attorney, solicitor and counsel.

The father of these parties, Abraham Brinckerhoff, died in March, 1823, seised and possessed of a large estate, and leaving a last will and testament, by which, amongst other things, he gave to his wife Dorothea, an annuity of \$5000 during her life, and made her executrix, and his sons Abraham and James together with John S. Schemerhorn, his executors.

On the 28th of October, 1823, Abraham and James B., transferred and delivered to their mother as a payment by them as executors towards her annuity, George B.'s bond of \$1900; and on the 31st of December, 1825, they transferred and delivered to her in like manner and on the same account, his bond of \$3258 27.

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Soon after the death of their father, difficulties and controversies arose between the complainant and his brothers, which were never adjusted or reconciled.

The complainant made large claims against them for professional services, and the proofs in the suit established the validity of such claims. There had been a settlement between him and his brothers firm in 1821. Many of the services however were rendered after that time. There were counter charges on the other side, but the precise state of the matter, either aside from the bonds or including them, was not shown. George B. alleged in his bill, that his just demands against his brothers individually and as executor of his father, were fully equal to all their claims against him, including the bonds. He was ignorant of the transfer of the bonds to his mother, until some years after her death, and no demand of payment, or assertion of claim upon them, was made from the time they were given, until August, 1842, when her administrator commenced a suit on them in the Supreme Court, in the name of James L. B., as survivor of himself and Abraham Brinckerhoff, Jr., who died in 1828.

Mrs. B.'s administrator, who was appointed in 1842, received the bonds from the hands of James L. B., as a part of his mother's assets with a writing attached to them, signed by her, in the words and figures following,

"Whereas I am desirous of preventing any legal controversy after my death, between the members of my family, if in my power. And whereas, I hold the annexed bonds and evidences of debt against my son George Brinckerhoff; I hereby direct the said bonds and evidences of debt, to be cancelled upon his or his legal representatives executing a good and sufficient discharge to the executors of my husband's estate, and also good and sufficient discharges to each of his brothers and sisters, or their heirs, of all demands whatever against them. And in case he should refuse so to do, I direct these bonds and evidences of debt to be made a set-off against any such demands, but they are never to be put in suit against him.

"New York, Jan. 21st, 1832. *Dorothea Brinckerhoff.*"

Mrs. B. died on the 26th of July, 1834. She left a will, which was subsequently set aside, after several years contestation, for

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the want of a proper execution and publication ; (see *Brinckerhoff v. Remsen*, 8 Paige, 491, and 26 Wendell, 325;) and Mr. Lawrence became her administrator. After the suit on the bonds was commenced, the complainant offered to the administrator to execute and deliver such discharges as were expressed in Mrs. B.'s writing annexed to the bonds, and to pay the costs incurred, on the bonds being cancelled. This offer was declined by the administrator, under the advice of his counsel.

The cause came to a hearing on the pleadings and proofs.

G. Brinckerhoff, in person, and *G. Wood*, for the complainant.

J. S. Lawrence and *D. B. Ogden*, for J. L. Lawrence, administrator, &c.

M. S. Bidwell, for J. L. Brinckerhoff.

THE ASSISTANT VICE-CHANCELLOR.—The objection that the defence to these bonds is a legal question, and the complainant's remedy is adequate at law, is presented for the first time, at the hearing, and therefore comes too late.

It is also objected that the whole case as now exhibited, upon the instrument signed by Mrs. Brinckerhoff, has been decided by the Supreme Court, in favor of her administrator.

If this be so, I ought not to examine the case ; and my first inquiry will be into that subject. The obligor in his defence to the two bonds in the Supreme Court, set forth in a plea, the transfer of the bonds to Mrs. B., that he had claims and demands as well against the executors of his father, (of whom she was one,) as against the representatives of the deceased obligee, and J. L. Brinckerhoff, the surviving obligee ; and that thereupon Mrs. B. from the motives and for the consideration and reasons which are therein expressed, *made and executed* the instrument in question. That after her death, the obligor tendered the releases which are called for by that instrument, and required a delivery of the bond from her administrator, who declined to deliver it up. And that thus Mrs. B. by that instrument, appropriated and applied those claims and demands of the obligor, in

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and to the liquidation and payment of the bonds, upon such releases being made; and by reason of the premises the bonds were fully paid, satisfied and discharged.

To this plea there was a demurrer, and the court gave judgment against the plea. The plea was certainly anomalous. It was a special *solvit post diem*, in which the pleader instead of setting forth the simple fact of payment, and relying upon this special matter as evidence to support it, has pleaded the evidence itself, and averred that the matter constituted payment. The evidence thus pleaded does not show an actual payment, whatever a jury might reasonably infer from it, if presented to them as proof of payment.

The opinion of the Chief Justice on the demurrer, is very brief and notices but two points. He says that it is a radical defect in the plea that no delivery of the instrument signed by Mrs. B. is averred. In this I most respectfully suggest, the learned judge erred. The averment in the plea is that she *executed* it, which imports delivery as well as signing. (See *Cecil v. Butcher*, 2 J. & W. 571.)

The other point adverted to, is that the instrument is not valid as a *donatio mortis causa*. Of this there can be no doubt, and it is not claimed to operate in that mode.

The question presented by this bill was therefore not before the Supreme Court, and I do not understand their decision as bearing upon it in any manner.

The complainant in the first instance, relies upon the instrument as a valid equitable *appointment*, in the nature of a donation *mortis causa*, and founded upon the same principle.

In support of this position, he cited *Lawson v. Lawson*, (1 P. Will. 441,) where the Master of the Rolls held a gift of a bill for £100 drawn by the testator in his last sickness upon his goldsmith, in favor of his wife, to be good and to operate as an appointment, and that it amounted to a direction to his executors to appropriate the £100 to his wife's use. It appears that the bill was indorsed by the testator himself to be for mourning, and it might well be upheld as a testamentary disposition. Lord Loughborough thought that was the *ratio decidendi* of the case of *Lawson*, as appears by his observations upon it in *Tate v.*

Hilbert, (2 Ves. jr. 120, 121.) On any other ground, it is opposed to the decision in the case last cited, and to subsequent decisions.

The other case relied upon under this head, (*Wekett v. Raby*,) I will notice elsewhere.

Swinburne says, there are three kinds of legacies of the nature of *donatio mortis causa*, two of which are clearly gifts *inter vivos* at common law. (Swinb. on Wills, 57, cited in 1 Roper on Leg. 1. (25.)) One of these is sometimes cited to sustain a gift without delivery, viz: Where a person not terrified by the apprehension of any present peril, but moved by the general consideration of man's mortality, makes a gift. It will be perceived that this after all, leaves it to be settled, what will make a gift valid. In the civil law, some gifts were valid without delivery, but not so in the common law. Swinburne was a doctor of the civil law, and his treatise is principally compiled from that source and the canon law. Lord Loughborough shows in *Tate v. Hilbert* before cited, (2 Ves. jr. 118, 119,) that Swinburne was not accurate in his definitions on this class of gifts; and Lord Hardwicke in his masterly judgment in *Ward v. Turner*, (2 Ves. sen. 438 to 442,) says that by the civil law as received and allowed in England, and so by the law of England, tradition or delivery is essential to all gifts made in contemplation of death, whether immediately or remotely expected.

I do not see that the instrument can be sustained on the ground of appointment or direction to Mrs. B.'s representatives.

In the next place, can the court enforce it as an instrument which was once delivered, and then retained by Mrs. B. in her own possession?

The argument on the part of the defendant, conceded that if the writing had been delivered, it would have been operative to discharge the bonds on the condition being performed. And on such delivery it would have been valid in her lifetime.

The only word in it which is indicative of a future operation is "*direct*;" and that word is not addressed to the representatives of Mrs. B. It is true the instrument recites that she is desirous of preventing any legal controversy after her death between the members of her family, if in her power; but the means which

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she therein designed to use, and all the objects which the instrument shows that she had in view, were capable of immediate accomplishment.

Therefore if it were in fact delivered, it may be upheld as a valid present gift or forgiveness of the debt, *inter vivos*. Indeed, if it were to be future in its operation, several of the cases to which I will presently refer, show that it would nevertheless be valid if it were delivered.

Then I meet the strong position, that there is no evidence of its ever being delivered by Mrs. Brinckerhoff.

There certainly is no direct testimony that the paper was ever formally delivered to any person, or that it ever was out of her hands. But courts often infer a delivery, and leave it to juries to presume one, from circumstances, when the instrument comes from the possession of the party by whom it was signed, and where there is no evidence whatever of his having parted with its custody when it was signed or subsequently.

There are many strong expressions in the books of the common law, against sustaining donations, either *mortis causa* or *inter vivos*, without actual delivery. The reason of this is, that gifts of both classes are usually claimed upon parol evidence, unsustained by any writing; and the courts have uniformly set their faces against such claims, on account of the great danger of perjury.

Where the intent of the donor is proved under his own hand, there is no such danger; and the courts have accordingly presumed a delivery in support of the gift, on slight evidence.

In the first place, the principle is the same as that laid down by Chancellor Kent, when speaking of a voluntary settlement, upon a daughter, which was found in the possession of the grantor; "It is always binding in equity upon the grantor, unless there be clear and decisive proof, that he never parted, nor intended to part, with the possession of the deed; and even if he retains it, the weight of authority is decidedly in favor of its validity, unless there be other circumstances, besides the mere fact of his retaining it, to show that it was not intended to be absolute." (*Souverbye v. Arden*, 1 J. C. R. 256.)

A reference to some of the authorities will show the application of the principle.

In *Barlow and wife v. Heneage*, Prec. in Ch. 210, the father signed a voluntary settlement and also a bond, to trustees, in favor of his two daughters, but kept both deed and bond, and received the rents of the estate included in the settlement, until his death. It was objected that the deed and bond were both voluntary, and always kept by the father in his own hands; but the Lord Keeper held that they were valid.

In *Clavering v. Clavering*, 2 Vern. 473, a voluntary settlement, made in 1684, never delivered out, or published by the grantor, but kept by him and found among his papers after his death, was held to prevail over a subsequent settlement made in 1690, and over the will of the grantor. And the decree was affirmed in the House of Lords. (7 Bro. P. C. 410, Tomlin's ed.)

Lady Hudson's Case, referred to by Lord Keeper Wright, in 2 Vern. 476, is similar, and the instrument was held valid.

In *Johnson v. Smith*, 1 Ves. sen. 314, a father made a deed of gift to his natural daughter, of all his mortgages, securities and debts due to him. He never delivered the deed, and he continued to treat the securities as his own; collecting, changing them, &c. This was held valid, upon the relationship and considerations for it existing between the parties; but the daughter was required to elect between that and a subsequent voluntary provision made by the donor.

In *Antrobus v. Smith*, 12 Ves. 39, which is sometimes cited on the other side, the court laid stress upon the declared intention of the donor to substitute a marriage portion for the gift which was in question. So that there was not only no delivery, and no intention to part with the control, but there was positive evidence of a contrary intent. And in that case the instrument itself was incomplete without some further act of the donor in transferring the stock embraced in the gift.

In *Uniacke v. Giles*, 2 Molloy, 257, where the deed of gift was executed, but always remained in the donor's possession and was destroyed by her; the court at first, sent it to a jury to try the question whether the deed was duly executed. The jury found that it was duly executed. It was however to take effect on the donor's death, and was of a chose in action. Upon this and her

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keeping it in her custody, it was held that it was intended to be revocable and that she had revoked it.

In *Exton v. Scott*, 6 Simons, 31, A. who had privately received and used moneys of B., secretly and without any communication with B., prepared and executed a mortgage to B. for the amount. The execution was in A.'s private office, when no one was present but his clerk, who attested the execution, and A. kept it secret during his life, and died insolvent twelve years after its execution; the mortgage never having been out of his possession. The court held that there being no evidence that it was executed conditionally, it took effect from its execution and was good against A.'s creditors.

In *Fletcher v. Fletcher*, 8 Lond. Jur. Rep. 1040, before Vice-Chancellor Wigram,^(a) the court sustained as a debt, a voluntary covenant, which the testator had made in favor of natural children. He had made a formal execution of it before his solicitor, but took and kept the deed till his death, and its existence was not known either to the trustees named in it, or the parties interested, until after his death.

(See also *Sear v. Ashwell*, 3 Swanst. 411, n. and *Worrall v. Jacob*, 3 Mer. 256, 270.)

The conclusion of Sir Thomas Plumer, Master of the Rolls, in *Cecil v. Butcher*, 2 J. & W. 578, shows the limitations under which equity proceeds in rejecting these gifts. Cases not within those limitations would of course be maintained according to his judgment. After stating the difficulty of extracting a principle from the authorities, he says there is a great preponderance of authority in support of the proposition, that "in a case where a voluntary deed is made without the knowledge of the grantee when it is made, for a special purpose for which it was never required to be made use of, when it has been kept in the hands of the grantor without ever being acted on, a court of equity will not relieve upon it."

The case of *Grangiac v. Arden*, 10 Johns. 292, is a strong authority on the question. The father purchased a ticket in a

(a) Now reported also in 4 Hare, 67.

lottery, on which he wrote the name of his daughter, then a child, and he declared it was bought for her. The ticket drew a large prize, which the father received, and used in his trade. He often said the prize was his daughter's and the money was hers with the profit upon its use; but neither the ticket, or its proceeds were ever in her possession. The Supreme Court held that the jury might from these facts infer a delivery of the gift, and on a case subject to the opinion of the court, gave judgment in accordance with that inference. (See also, *Davis v. Davis*, 1 Nott & McCord's R. 225, note, b.)

It will be perceived that a delivery is inferrible from slight circumstances; and where an actual delivery is shown, it may be of the merest formal character. A simple signature, and handing the instrument to the solicitor who prepared it, or giving it to a clerk to attest it, and then taking it back and always keeping it, is held conclusive, without any attendant circumstance what ever.

So it is not necessary that the gift shall take effect immediately, but if there be a delivery, the gift is valid although contingent, or not intended to take effect till after the death of the donor. (*Peck v. Parrot*, 1 Ves. sen. 236; *Johnson v. Smith*, before cited and S. C. Belt's Supplement to Ves. sen. 154; *Powel v. Cleaver*, 2 Bro. Ch. Ca. 499, 502.)

In this instance, there are many circumstances in support of the presumption of a delivery of the instrument in such a form as to make it valid; not to the complainant, but to the person who prepared it; or a similar formal delivery.

It was not a testamentary disposition, nor was there any apparent intention to preserve by means of the bonds, any further control over the complainant. Its whole consideration and inducements were then in existence, and were founded on events already passed. The instrument shows that Mrs. B. knew her son George had, or claimed to have, demands against her late husband's executors, and against her other sons. It shows, either that there was already difficulty between George and his brothers, or that the embers of a controversy were already glowing and likely to burst into a flame. Her design was to extinguish those embers, by having George release all his claims; and

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to induce such a release, by forgiving to him the bonds in question. This did not look to the future. The case before me shows that she could scarcely have imagined that any future dealings or claims were to grow up between him and her other children, and the improbability that the condition in the instrument was to operate upon any such claims. She had placed in that condition, all the power and control that she intended to have over the bond debt. When the condition was complied with, her intent would be fully accomplished. She declared emphatically, that the bonds were never to be put in suit against this complainant.

There is no reason to doubt upon the facts disclosed, but that Mrs. B.'s intention was, to make an absolute and final disposition of these bonds; and that she had no intention to do any further act on her part, or to attach any other qualification or condition to their discharge, than that expressed in the instrument which she signed. These circumstances are very strong to prove a formal execution or delivery; as may be seen by the Lord Keeper's observations in *Ward v. Lant*, Prec. in Ch. 183, and those of the Master of the Rolls in *Hooper v. Goodwin*, 1 Swanst. 491. In one of these cases, there was shown to be an intention that the writing should not take effect, and in the other there was a further act to be done by the donor, which he was preparing to do, but never effected.

The authorities upon the subject of gifts *inter vivos*, are certainly somewhat inconsistent, and the principle of some of the cases difficult to appreciate.

But having regard to the preponderance of authority, and the force of the circumstances attending this instrument, I should feel bound to direct an issue upon the question of its delivery, if the case turned wholly upon that point.

In the case of *Pye, Ex parte* and *Dubost, Ex parte*, 18 Ves. 140, 150, the testator had written to his agent at Paris to buy an annuity of £100 for a person who had been his mistress, and to draw on him for the purchase money. The agent bought the annuity accordingly, but took it out in the name of the testator, because the lady was deranged. The testator soon after sent to the agent, a power of attorney to transfer the annuity to her, but died

before the agent made the transfer. Thus there was a full intention to make an absolute gift, and the testator had signed all requisite papers, but there was no delivery of the subject matter of the gift. Lord Eldon sustained it however, on the ground that the testator had committed to writing a sufficient declaration that he held that part of his personal estate, (the annuity,) in trust for the annuitant.

The case under consideration is analogous, if there were any execution of the writing by Mrs. Brinckerhoff. This doctrine of a trust has been applied in other instances where there was no delivery of the things bestowed, or the covenants being voluntary, could not be enforced. But I find no authority for it, where the writing on which it rests, has not had a formal execution, so that it does not aid this case independent of the question of the delivery of the instrument.

Courts of justice ought never to strain a point of law to relieve a case of hardship or to support a claim however meritorious; yet I think that a court of equity should strive to uphold and validate an instrument, which the party evidently designed to make effectual, and which was made not merely upon the good consideration of the complainant's demands against members of her family, but on the high and holy consideration of settling existing family broils and avoiding them in future; if the principles of law, or the force of judicial decisions, will sanction the decree.

There are several decisions some of which are authoritative, and others entitled to entire respect, which it appears to me, fully sustain the complainant's case upon the instrument in question.

Without relying upon the presumption of its delivery or formal execution, I will proceed to a statement of those decisions.

In the case of *Wekett v. Raby*, 2 Bro. P. C. 386, (T'omlin's ed.) there had been great intimacy between Mr. Pigot, the testator, and Raby who was his counsel. Pigot had given Raby large sums, and Raby had released him from all demands. Besides this, Raby owed Pigot a bond for £235 5s. In his last sickness and a few days before his death, the testator made this declaration touching the bond. "I have Raby's bond, which I keep; I don't deliver it up, for I may live to want it more than he; but when

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I die, he shall have it, he shall not be asked or troubled for it.' The bond being put in suit after his death, by his executrix and residuary legatee, Raby filed a bill to have it delivered up, and Lord Macclesfield decreed it to be delivered up to be cancelled. It was proved that the executrix soon after the testator's death virtually promised to give up the bond to Raby; but the bill proceeded entirely upon the testator's order and direction in his last sickness. On an appeal to the House of Lords, this decree was affirmed February 23, 1724.

This case has been the subject of much remark. Sir John Mitford, then Attorney General, and Mr. Leach, afterwards Vice-Chancellor, in *Byrn v. Godfrey*, 4 Ves. 9, put it upon the ground that it would have been a fraud in the residuary legatee to disappoint the intention of the testator. They, as well as Lord Loughborough in the same case, speak of the legatee's promise to deliver up the bond; but it will be observed that the answer did not admit the promise, and there was no proof to that effect, except in answer to a naked solicitation of Raby to her, to give it up out of friendship, without making any reference to the testator's gift, or claiming any right to have it cancelled.

Aston v. Pye, 5 Ves. 351, note b., and page 354, as stated by the Chancellor, was a suit in the Common Pleas on a note of Pye to the testator who was his uncle. After the testator's death an entry was found in his book in these words, "Pye pays no interest, nor shall I ever take the principal unless greatly distressed." The court held this to be a discharge of the note.

In *Eden v. Smyth*, 5 Ves. 341, 356, there was an attempt to defeat a legacy given to Eden by his father-in-law, Smyth, in his will; by means of a bond for £1000, which Eden had given to Smyth for borrowed money, and two other bonds, one for £1000 and one for £900 which Smyth had signed with Eden to others as surety for money loaned; the latter of which Smyth had paid in his lifetime, but had not taken an assignment of it. This bond and the bond given directly to Smyth, were in his possession at the time of his death. A letter from Smyth to Eden's mother, was produced, in which S. says, he has released Eden and his wife of £1000 he had lent to Eden, and that the principal of the £1000 to Boucher (for which Smyth signed as surety) must fall

to his (Smyth's) lot. By the testator's annual statements of his property, and from two or three loose memoranda, it appeared, that for a time he entered the £1000 bond executed directly to him, as a debt due from Eden; and the other £1000 and the £900 bond, as debts owing by himself which Eden was to pay; but subsequent to the testator's receiving a large accession to his property from a relative, he no longer entered Eden's bond as due to him, or the £900 bond as payable by Eden; and entered the Boucher bond as one that he was to pay himself.

On this testimony Lord Loughborough held that Eden was discharged from the debts. He declared that he was satisfied from all the papers together, that it was no intention of Smyth that these debts should have been put in demand by his executors; that the paying off the bond of £900 without taking an assignment of it, with the other facts, made it perfectly evident that he had no intention to make any demand for the £900; and that the letter to Mrs. Eden would as to the first £1000 bond, be evidence of a release at law, and would destroy the bond.

It will be observed that there was no delivery of the gift, or of any writing by which the intention to make the gift was manifested; in either of the cases last cited. And the securities discharged by the gift remained in the possession of the donor until after his death.

In *Wekett v. Raby*, there was not even written evidence of the intention; and in neither of the cases, was the intention to forgive the debt, so plainly and unequivocally proved, as it is in the case now under consideration.

In *Gardner v. Gardner*, 22 Wend. 526, a parol gift by a testator to his wife, was sustained by the Court for the Correction of Errors, (reversing the Chancellor's decision upon the facts involved,) under these circumstances. The testator had loaned to his wife \$2000 in 1827 and taken her bond for its re-payment. The wife had a separate estate and the money was borrowed for the benefit of that estate; so that by the law as settled in this state, her separate property was answerable for the debt. The debt was collectable in equity, and the bond would furnish a part of the evidence of the debt; but the bond was not recoverable at law, and equity would require accompanying proof of the

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purpose for which the loan was made. In 1829, four or five months before his death, the testator who had previously delivered the bond to a friend with instructions to destroy it, if any thing happened to him; sent for the bond, and burnt it up himself, telling his wife that the money was hers. It was also proved that before sending for the bond, he had on the same day requested his wife to destroy the papers, if any thing should happen to him, which she declined to do.

The reporter has stated this case as a *donatio mortis causa*, but the decision does not rest upon or even approach that ground.

In *Tower v. Taggart*, administrator of *Tower*, 5 Binney, 490, the intestate had paid into Taggart's hands large sums of money from time to time, till they amounted to \$10,000. He was under personal obligations to Taggart in early life, and repeatedly said that Taggart's family should lose nothing by it, and that he should leave \$8000 to Taggart's children. After his death a paper was found in his pocket book, signed by him and acknowledging that he was indebted to Taggart in the sum of \$8000 for value received of him, and dated subsequent to the deposit of the whole \$10,000. The court held that under the circumstances of the case, the writing should be considered as evidence of a debt due by the intestate to Taggart, which the latter might retain out of the \$10,000.

In *Wentz v. Dehaven*, 1 S. & R. 312, the testator having a bond and mortgage against his daughter and her husband Wentz, signed a writing in the presence of two witnesses, in which he stated that he had a bond and mortgage from Wentz, and concluded thus, "which I intend to give up to them, as I never intend to demand it from them, nor any part of the interest due or to become due at any time." He delivered this writing to Wentz, but he kept the bond and mortgage, and died ten years afterwards, without having ever received or called for any part of the principal or interest. The court held that the paper was an absolute and immediate discharge of the debt.

These authorities support the claim made to have these bonds delivered up, on complying with the prescribed condition.

It is not necessary, or perhaps possible, to make these cases to harmonize with some of those where the gifts were not sustained.

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I will, however, suggest a distinction. The cases adverse to the validity of the donation, were those in which the donor has sought to transfer, or shown an intent to transfer, property actually existing and tangible, or to effect a gift by his own promise or contract to pay at a future time, as by making his own note, bond or the like.

In the cases which I have last cited and commented upon, the aim was *to forgive a debt*, to discharge an obligation already due from the object of the donor's bounty. A debt may be forgiven and discharged in effect by parol, as by means of a confession of payment; and it is never required that it shall be evidenced by so formal and authentic an act or instrument, as a donation of property, or the transfer of a thing in action.

Even a bond may be released by a parol agreement executed. (*Dearborn v. Cross*, 7 Cowen, 48.)

Whatever may be the true *rationale* of these decisions, I am content to be governed by them in this case, and must hold that the bonds are to be given up.

The suit at law being in James L. Brinckerhoff's name, he was a proper party to this suit.

There must be a decree accordingly, without costs to either party.

JANEWAY'S EXECUTOR v. GREEN and others.

A testator having two bond debts payable on demand with interest, against F. the husband of his granddaughter G., gave one-ninth part of the bulk of his estate to trustees, in trust, first to pay to his executors out of the same, *but not out of the annual income or proceeds*, all such sums of money as might be owing to him at his decease, by F., and secondly to pay to G. for her life, the net annual income and product of the residue of the trust property or estate, for her separate use. The ninth of the personal estate was not enough to pay half the principal of F.'s bonds. The trustees omitted for several years, to pay off F.'s debt, and used the testator's personal effects to improve his real estate and make it productive. They then claimed that interest should be paid on the debt out of G.'s income from the ninth part.

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Held, that no interest was payable on the debt of F. after the death of the testator, either out of the net income or the capital of the ninth part.

Also that interest was to be computed on the bonds until his death, and paid to the executors.

F.'s debt is to be regarded as one due from a stranger, and it is simply a charge or burthen of a sum in gross, imposed upon the capital of the trust fund, and upon such a charge, an obligation to pay interest cannot be implied except upon the plain intention of the person by whom it is granted.

There is no equity in the case which requires G. to pay out of the income such sum as it has been benefitted by the trustees omission to pay the debt of F. *Nen constat*, but that the whole estate has been benefitted in a corresponding degree by such omission.

Where an order of the court, made in the city of New York, refers to the *amount of the annual rent* received at its date by one entitled to the net income of real estate; the direction is to be deemed as intending the rent for the year ending on the first day of May.

February 7; March 14, 1845.

THE bill in this cause was filed on the 26th of December, 1839, by Jacob J. Janeway, as surviving acting executor and trustee of George Janeway, formerly of the city of New York, who died on the second day of September, 1826, seised of a large real estate of inheritance in that city, and possessed of considerable personal property; for directions in respect of the share of the estate given to Sarah Ann Green, then Sarah Ann Freeman, and for the settlement of the executors accounts in respect of the same.

The paragraph in the will upon which the questions arose in this suit, was in these words:

"Thirdly. And touching the one other full and equal third part of the rest, residue, and remainder of all and singular my said real and personal estate, I give, devise, and bequeath one-third part thereof, the whole into three equal parts to be divided, unto the said Ann Janeway, Jacob J. Janeway and Peter Sharpe, and their heirs, executors and administrators, respectively as joint tenants, and not as tenants in common, upon the following special trust and confidence, that is to say, that they my said trustees shall and will from and immediately after my decease, stand seised and possessed thereof, upon the following uses, trusts, intents and purposes. First, to pay to my said executors out of the said trust estate or property so bequeathed and devised

to them, (but not out of the annual income or product thereof,) all such sums of money as may be owing to me at my decease by Augustus Freeman, the husband of my granddaughter Sarah Ann Freeman, daughter of my deceased son William Janeway. Secondly, to pay over to my said granddaughter for and during her natural life, in regular payments, the net annual income and product of the residue of the said trust property or estate, to and for her sole and separate use free from and independent of her said husband, his control, debts, and engagements, except his debts which may be owing to me at my decease as aforesaid. And I will that her separate and individual receipts to my said trustees shall, notwithstanding her coverture, be full and valid discharges for all payments directed to be made to her by them, and from and immediately after the death of my said granddaughter, upon trust to distribute and divide the residue of the said trust estate and property, to and among the children of my said granddaughter now born, or hereafter to be born, share and share alike, as tenants in common; and if any of the said children shall then be dead, leaving lawful issue living at the death of my said granddaughter, then to distribute and divide the same to and among the children of my said granddaughter then living, and the issue of such of them as may then be dead, such issue taking only the share or portion which would have fallen or belonged to his, her, or their parent or parents."

The residue of the devises and bequests of the third part of the estate, were for the benefit of Mrs. Freeman's brothers, George and William Janeway.

At the death of the testator, Augustus T. Freeman, named in the will, was indebted to him in two bonds, both executed by William M. Ross and Freeman, and payable on demand with interest, one for \$2000, dated March 1, 1824, and the other for \$4400, dated September 24, 1825.

Freeman died after the testator, and his widow in December, 1832, married Joseph Green. The executors and trustees paid the entire net income of the ninth part of the estate, to Mrs. Freeman until June 2, 1833, supposing till then, that they could not retain out of it the interest on the Freeman debt. At that date the interest on the debt from the death of the testator

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amounted to. \$2662 66 ; and after that time they retained the accruing interest at six per cent. out of her annual income. They had previously paid to her for income, the aggregate sum of \$12,229 08. From June 2, 1833, to May 10, 1838, they paid her annually, about \$1590 ; and from the latter date about \$2260.

The real estate of the testator had been partitioned ; and the complainant asked the direction of the court as to the manner in which he should raise and pay the Freeman debt, and as to his retaining out of Mrs. Green's income, the interest accrued prior to June 2, 1833.

It appeared that on the 18th of October, 1830, on the petition of the trustees an order was made by this court, authorizing them to apply the testator's personal estate to the erection of buildings on his vacant lots ; and the same having been so laid out, the court on their presenting another petition, made an order on the 19th of October, 1831, authorizing them to raise not exceeding \$50,000, by mortgage of the real estate, to be expended in the same manner. Nearly \$47,000 was raised and applied accordingly.

The order also created a sinking fund to be provided from the income of the property when improved, by appropriating such balance as would remain of the annual rents of the estate, after paying to each person interested therein such amount of the annual rent as such person at that time received.

Mrs. Green in her answer, insisted that no part of her income ought to be applied to the payment of the interest on the Freeman debt, and that the trustee ought to refund to her what he had retained on that account since June, 1833.

Issue being joined in the cause, it was on the fourth of September, 1840, by the consent of the parties referred to one of the masters of the court, to take and state the accounts between them.

The master's report was filed on the 27th of October, 1843. He allowed against Mrs. Green, the deduction made by the trustees from the income of the ninth part of the estate after June 2, 1833, in respect of the accruing interest on the Freeman debt ; but refused to charge her with the interest thereon prior to that date in respect of the net income which had been paid to her by

the trustees while they supposed they had no right to deduct the interest.

To this part of the report the complainant excepted; while Mrs. Green took an exception to the master's allowance of the charges made against her by the trustee for interest on the debt after June 2, 1843; and by another exception she insisted that no interest was chargeable on that debt, either against the one-ninth of the estate, or against the income of the same.

It appeared that the trustees on the first day of October, 1839, appropriated out of Mrs. Green's income \$500 towards the sinking fund of the building debt, on the ground of its being a surplus beyond the amount of the annual rent which she was receiving at the date of the order made in October, 1831. This was done on the assumption that the annual rent intended by the order, was that of the fiscal year of the estate, which commenced on the first day of September in each year; and on that footing there was a surplus as charged. But assuming that the calendar year, or the letting year from May to May, was intended by the order, Mrs. Green's income up to 1839, had not exceeded the amount of the annual rent she was receiving in October, 1831. The master disallowed the charge of \$500, and the complainant took an exception to his decision.

The trustees in their account had charged to Mrs. Green \$1763 16, the expenses of certain improvements and erections on premises in Chatham-street which in the partition were allotted to this ninth part of the estate. The master decided that only \$721 of this sum was properly chargeable upon her life estate in the property, and that the residue must be borne by those entitled to the ninth part in remainder, to which she excepted.

The cause was heard on the pleadings, the master's report, and the exceptions taken.

G. G. Waters and W. S. Johnson, for the complainant.

W. Lowerre and E. Sandford, for Mrs. Green.

THE ASSISTANT VICE-CHANCELLOR.—The complainant's first, and Mrs. Green's first and second exceptions, relate to the

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interest upon what is called the *Freeman debt*. The one party claims that the interest on that debt at the legal rate, shall be borne by Mrs. Green in respect of her enhanced income by reason of its not being taken out of the capital; while the other party insists that no interest whatever is to be paid on the debt, either from her income, or out of the capital of the ninth part of the estate.

I have considered the question with great care and attention, and the result is a clear and strong conviction that no interest is to be paid on the debt of Freeman.

I will advert briefly to the circumstances.

At the date of the will the testator held two bonds executed to him by William M. Ross and Augustus T. Freeman, one dated March 1, 1824, for \$2000 with interest, and the other for \$4400 with interest dated September 24, 1825. Both bonds, were in effect payable on demand.

It appears that Freeman had been in business, and the money represented by the bonds was sunk, and he had become insolvent. The circumstance of the testator's taking bonds, payable as these were drawn, indicates that he had little or no expectation of their ever being paid by the obligors.

Freeman was then the husband of Mrs. Green. As the granddaughter of the testator, she had an acknowledged claim upon his bounty for one-ninth part of his estate. He made his will on the 12th of April, 1826, and gave one-ninth part of the residue, or chief part of his estate, both real and personal, to trustees, upon trust, *first* to pay to his executors out of the same, *but not out of the annual income or proceeds thereof*, all such sums of money as might be owing to him at his decease by Freeman; and secondly, to pay to his granddaughter for her life, the net annual income and product of the residue of the trust property, for her separate use.

The ninth part of the personal estate which enured to this trust, was not enough to pay half of the principal of the bonds; and it was conceded that the real estate of the testator yielded only about four per cent. on its valuation.

The subsequent management, and the course pursued by the trustees, is not important to the inquiry. The solution of the

question is to be derived from the will and the state of things existing at the testator's death in September, 1826. And the question is, did the testator intend that any interest should be charged on Freeman's debt after his death, against this ninth part of his estate; and if so, did he mean that Mrs. Green's income should under any circumstances bear a portion of such interest?

It will be observed that this charge is not a debt due from the devisee or legatee. Freeman owed the debt jointly with Ross. He had no bequest whatever from the testator. So far as the ninth part of the estate is concerned, the question must be regarded precisely as if it were the debt of Ross alone, or of any other stranger to the blood of the testator, which he had thought proper to have deducted from such ninth part.

It is simply a *charge* or *burthen* imposed upon the capital of that ninth part, for the reason that the testator had been induced to make the loans to Freeman by reason of his family connection.

Now what does the will direct as to the payment of this charge?

Not that it shall be paid generally, out of the ninth part and its products. The income is expressly exempted from contributing to its liquidation:

Nor is there any direction to pay to the executors interest upon the debt.

It is evident from the careful exclusion as to the income, that the testator anticipated some delay in paying the Freeman debt. Yet the will is silent as to the payment of any interest. The charge is plain and explicit, to pay *the sums of money* which Freeman owed to him at his death. Not the sums of money which Freeman owed him, *with interest thereon*, or with interest until paid.

The direction is equally explicit that no part of those sums, shall be paid out of the annual income or product of the trust estate.

The scope of the will and the testator's views, I think may be thus summed up. He set apart one-ninth of his residuary property for the benefit of his granddaughter and her issue. As her

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husband had failed, and the trust estate would be her only means of support, and would moreover produce a moderate rate of income; the testator devoted to her use the whole of such income, without any charge or abatement, during her life. At the same time, he required the trust estate ultimately to repay the sum due to him from Freeman; and he left it to the trustees in the exercise of their discretion, to appropriate the necessary amount out of the capital of that estate, whenever in their judgment in reference to the interests of all concerned, it was proper to make the application. A delay might enhance Mrs. Green's income for a time, and might still be for the benefit of the testator's estate at large.

It surely could not have been his intention to authorize the trustees to delay a payment of the debt in the manner here claimed. If it carried interest at all, it bore interest at seven per cent. Suppose the net income of the whole trust estate, or ninth of the residue, were four per cent. It is manifest that every year's delay would be a positive injury to Mrs. Green to the extent of three per cent. on the debt, if the interest should ultimately come out of her income.

The will does not provide that in case of a delay, Mrs. Green's income shall contribute to the interest of the debt. As I have stated, the testator contemplated a delay, and at the same time, interdicted any interference with the income of the trust property.

In order to make the debt bear interest as against this trust estate, it is necessary to insert in the will the words "*with interest thereon.*" This cannot be done by construction, when there is nothing in the will which declares such an intent. (See *Mann v. Mann's Executors*, 1 J. C. R. 231; S. C. 14 Johns. 1.)

At the death of the testator, there was due on these bonds, the sum of \$6827 46. Suppose the devise and bequest of the ninth part had read thus: "In trust, first, to pay to my executors out of the said trust estate, (but not out of the income thereof,) the sum of \$6827 46." Would that have imposed a charge for interest, either upon the income or capital? Clearly not. It would have been a mere charge on the capital, to be paid in

gross, by a sale or other application of the capital. The executors could have compelled and hastened such payment; but the executors could not collect interest, and neither they or the trustees could retain or reclaim from the tenant for life, the income of any part of the capital which accrued prior to such application.

The language used in this will, "sums of money owing at my decease," with the language of the two bonds; is the same in effect as if the expression had been "the sum of \$6827 46."

Keeping in view that this is not a *debt* of Mrs. Green's, or of the remaindermen in the trust estate, but a simple charge of a sum in gross upon the capital of a fund, and payable out of the capital alone, and whether sooner or later, exclusive of the income of the fund; and there is no difficulty in the question. Even upon a debt, interest is never charged for mere delay of payment. It is charged upon a contract to pay it; by statute; and by way of damages upon a breach of trust. A contract to pay interest is sometimes implied, but there is no such implication upon a mere charge, unless upon the plain intention of the person granting the charge.

There are some authorities which by analogy, fully sustain the construction which I have maintained.

In *Hawley v. Cutts*, Freem. Ch. R. 24, A. owed B. £300 on a bond. By his will B. made a bequest in these words, "I give A. £300 in money which he oweth me upon bond." At B.'s death, there was £20 due for interest besides the principal of the bond. It was held that the interest did not pass by the bequest.

In *Roberts v. Kyffin*, 2 Atk. 112, (more fully reported by the name of *Roberts v. Kyffin*, in Barnard. Ch. R. 259,) the testator gave to his son the following bequest, "I give to T. R. £300 which I have at interest secured by a mortgage on the estate of Marriot, and I also give him all the messuages, lands and tenements secured for the payment of that money, till the same be paid and discharged." Lord Hardwicke held that the son was entitled to the principal only, and not to the interest on the mortgage. He said it was very clear on the first clause of the will, standing by itself. And he put by way of illustration, the case of a bequest of £300 upon a bond; concurring with the decision in *Hawley v. Cutts*.

In *Smallman v. Goolden*, 1 Cox's Ch. R. 329, the testator gave to his son "all sum and sums of money due to me from him, on bond or bonds or any other security." The son was indebted on bond at the date of the will, and subsequently became indebted to the testator on a bond for £100. Lord Kenyon, then Master of the Rolls, decided that the latter bond was not included in the bequest.

In *Hamilton v. Lloyd*, 2 Ves. jr. 416, the testatrix had a mortgage upon an estate of which her brother was tenant for life, and had his bond for £120 arrears of interest on the mortgage. In her will she disposed thus; "I give to my brother Lloyd *the arrears* of my mortgage upon his estate," &c. It was contended that this was a gift of the mortgage itself. But Lord Loughborough deemed it too plain to raise a doubt upon, and limited it to the bond for the arrears.

In *Jones v. Lord Sefton*, 4 Vesey, 166, the testator gave his personal estate to his wife, and to his son he gave all arrears of rent due to him at his death. When he died he had a bond given to him for arrears of rent several years previous to that time. Lord Loughborough decided that the bond was bequeathed to the widow, and not to the son.

I was referred on the other side to *Clarke v. Sewall*, 3 Atk. 99. What is there said by the Chancellor, relates to interest on the legacy, not on the debt; as may be seen in *Ward on Legacies*, 299.

In *Gittins v. Steele*, also cited from 1 Swanst. 199, legatees who had received a particular legacy, were required to refund in part, on the construction of the will; and on the question whether they should pay interest, the Chancellor said he would not ordinarily charge interest, but as the same legatees were entitled to another fund which was making interest, he charged them interest at four per cent. on the amount overpaid.

Upon these authorities, it is impossible to hold that the words "sums of money due to me," mean in a will, sums of money due to me with interest thereon.

Unless we add those words to the will, there is no authority to the trustees to take interest on the Freeman debt, out of the capi-

tal of the trust estate. And the will is express against taking it out of the income.

It may be said that equity requires Mrs. Green to pay out of the income, at least such sum as the income has been benefitted by the trustee's omission to pay the debt of Freeman whereby the capital and income would have been proportionably reduced. But no such equity is apparent. The testator intended she should have the full income, until the trustees should sell and pay the charge. They have thought proper not to sell, and I am not to presume that they acted unwisely. *Non constat*, but that the whole estate has been enhanced in value for the remaindermen, more by the turning in the personalty for its improvement and the keeping of it in mass, than it would have been by the payment of the Freeman debt through a sale of a portion of the real estate.

I think there is no ground for withholding from Mrs. Green any part of the income, and therefore must overrule the complainant's exception, and allow the second exception of the defendant.

Her first exception is also allowed, except so far as it may embrace interest which had accrued on the bonds at the death of the testator. The language of the will so frequently cited, and the subsequent words applied to the same subject, viz. "his debts which may be owing to me at my decease as aforesaid;" are sufficient to embrace all dues at that time, whether for principal or interest, and on bond, note or simple contract.

The complainant's *second exception* relates to the master's disallowance of a charge of \$500 which the trustee had taken from Mrs. Green's income, and carried to the sinking fund for the discharge of a debt of near \$50,000 which was incurred for the improvement of the real estate of the testator in pursuance of an order of this court made in October, 1831.

By this order they were permitted to apply to that fund, such balance as would remain of the *annual rents* of the estate, after paying to each person interested in the estate, *such amount of the annual rent, as such person at that time received.*

The *annual rent* in this direction must be deemed the rent from the first of May in each year, that being the letting year in

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this estate, as well as the letting year recognized in the city of New York by our statutes.

With either the letting year, or the calendar year, as the basis, there never has been any balance, after paying to Mrs. Green the amount of annual rent which she received at the time the order was made. The master's decision was unquestionably right, and the exception must be overruled.

The defendant's third exception is founded upon the master's charge to her of \$721, it being a part of the expense of certain permanent improvements and erections made by the trustee upon the ninth part of the estate as allotted in the partition, from which her income was derived.

The master's statement of the facts, in connection with the schedule marked I. attached to his report, abundantly sustain his allowance of the charge, and the exception must be disallowed.

The master's report is confirmed in every particular, save the interest on the Freeman debt. If the parties can agree upon the balance after deducting the sums withheld for that cause, a decree may be entered at once, disposing of the whole matter. Otherwise the cause must be sent back to the master.(a)

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Where a will directs an executor to invest a large personal estate, given ultimately to four legatees on their becoming of age, and out of the interest to pay their support and maintenance, sundry small legacies, and an annuity of \$100 during their pleasure, with power to increase it in the discretion of the executor; and the executor after paying the annuity without increase for twelve years, divided the estate, appropriating \$10,000 as a fund for the payment of the annuity, and a legacy of \$500 and the support of that legatee which was charged on the estate during minority; and then divided the residue:

It was *held*, that this act was an exercise of the discretion of the executor, so far as to limit the future increase of the annuity to the clear remaining income of the

(a) The parties subsequently agreed upon the corrections to the master's report, and a decree was entered accordingly.

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fund set apart after defraying the other charges upon it; and neither a subsequent administrator or the court acting upon the fund, could increase the allowance beyond that limit.

February 4; March 25, 1845.

JOHN ABEEL who died in 1811, by his last will and testament, gave almost his entire estate to his niece Julia H. Brasher, who afterwards became the wife of R. D. Weeks, Isabella A. Howell, who afterwards became the wife of George Case, and Jane A. and Mary A. Howell, children of Phebe Howell, with a limitation over to the survivors on the death of either without issue. He gave to Phebe Howell an annuity of \$100 during the pleasure of his executors or the survivor of them, with power to increase it in their discretion. By a codicil he gave \$500 to a child of which Phebe H. was then *enciente*, in case it lived to become of full age. This child when born was named John H. Abeel.

The testator directed his personal estate to be invested, and the executors out of the interest, were to pay some pecuniary legacies, the annuity to Phebe H., and maintain and educate her expected issue and the four principal residuary legatees; and their respective portions were to be paid to them as they severally came to the age of twenty-one years.

Mrs. Weeks became of age in May, 1823, upon which Garret B. Abeel, the acting executor, set apart \$10,000 of the personal property, as a fund to provide for the support of Phebe Howell and her son, and the payment of the legacy to the latter. And he then distributed the residue, or what he deemed to be such, from time to time, among the four principal legatees.

In February, 1827, Mr. Case and his wife filed a bill for an account against the executors, to which all the persons before named were parties. The decision of the Chancellor in that suit is reported in 1 Paige, 393. By the decree then made, the appropriation of the \$10,000 was recognized; and the general expenses of the estate as well as the support of Mrs. Howell and her son and his legacy, were charged upon that fund from the time it was set apart. When the master made his report in that suit, the fund was \$9359 43.

Jane A. Howell, now the wife of J. Towle, became the administratrix of John Abeel on the death of his surviving executor.

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The fund when it came to her hands was \$9114 78, and the legacy of \$500 was paid out of it to John H. Abeel when he became of age in 1832.

Up to this time there had been no increase in the allowance to Mrs. Howell, but she had received her annuity of \$100 from the testator's death. She was maintained after this until her death in the summer of 1843, by Towle and wife.

On the 5th of October, 1838, Mr. Case and his daughter Mary J. filed the bill in this cause, to have the remaining fund ascertained and secured. Mrs. Case had died prior to that date, and her daughter and only child died while the suit was pending.

The cause came on before Assistant Vice-Chancellor Hoffman, who on the 23d day of December, 1841, made a decree to the effect that Mr. Case and his daughter, and Mrs. Weeks were entitled respectively to one-fourth of the fund subject to the charges upon it, and directing Towle and wife to bring those two-fourth parts into court. The decree also directed a reference to inquire whether Mrs. Howell since January 1, 1831, had been entitled to an increase of her annuity, and if so to what extent; and what amount Towle and wife had paid to or expended for her.

On the reference, Towle and wife claimed that Mrs. Howell was entitled to a large increase of the allowance in her declining years, and offered to prove that they had actually and necessarily paid to and expended for her support from 1830 till her death, more than the whole fund which Mrs. Towle received as administratrix, both principal and interest.

On the other hand, it was insisted that the administratrix had no power to increase Mrs. Howell's allowance, that the executor had restricted its utmost extent to the income of the fund in question, and that it was in effect limited to that income by the interlocutory decree.

The master thereupon by consent, made a special report asking the direction of the court, before going into the mass of testimony in regard to the actual support of Mrs. Howell.

Some other facts will be found stated in the opinion of the court.

J. L. Mason, for the complainant.

N. D. Ellingwood, for Towle and wife.

THE ASSISTANT VICE-CHANCELLOR.—The question presented by the special report of the master, was decided by my predecessor when this cause was before him in October, 1841.

His opinion then pronounced, was clear and emphatic, that in no event could the administratrix *de bonis non*, or even the original executor, encroach upon the capital of the reserved fund of \$10,000, in order to enhance the yearly allowance to Mrs. Howell.

The decree which was thereupon entered, it is true, does not in express terms limit the master to the income of that fund, in his allowance for Mrs. Howell's support. But I think the provisions of the decree which require Mr. Towle to bring into court the two equal fourth parts of the capital of the fund, for the shares of the complainant and R. D. Weeks, and the positive adjudication that the complainant is entitled to the one-fourth part of the capital; are incompatible with the master's going beyond the income in his inquiry as to the proper extent of the allowance to the annuitant.

Such being the decision, and in my view, the decree, of my learned predecessor, I ought not to direct otherwise, unless upon a very strong conviction that he erred in his conclusion.

But I have no doubt of the correctness of his judgment upon this point.

The testator had a very moderate conception of the necessary extent of his bounty to Mrs. Howell. He fixed it in the first instance at \$100 a year, and the payment of that amount was purely discretionary with his executors. He authorized them to increase the yearly income to her, in case they should deem the increase expedient and necessary. Thus the whole thing rested in the discretion of the executors and the survivor of them.

In May, 1823, Mrs. Weeks became entitled to receive her portion of the estate, and the surviving executor proceeded to make a distribution accordingly. He had the experience of nearly twelve years administration of the estate, to guide him in his estimate for the future, and if I correctly understand the fact, he had not to that period, increased Mrs. Howell's annuity beyond \$100, and

did not increase it while he lived. He then in the exercise of his judgment and discretion, set apart the sum of \$10,000 in order to provide for the yearly payment to Mrs. Howell, the support of her son until he should attain his full age, and the payment of his legacy of \$500.

It was clearly his design to provide a sum, *the income* of which would defray the annual charges thus payable.

The annuity of Mrs. Howell, and the support of her son, were charges which would recur yearly. The latter would continue about nine years, if he survived; and the former for an indefinite period, dependent upon the duration of Mrs. Howell's life; and which in fact continued for twenty years. No gross sum could have been set apart for these objects, with either safety or propriety.

The executor's subsequent management of the fund confirms this view of his intent. According to his account as passed by the master in *Case v. Abeel*, the fund of \$10,000 remained unimpaired for five years after it was thus set apart; and it was but slightly impaired while he retained it, and for aught that appears, the portion used was for general charges of the estate, which the Chancellor imposed upon it by his order dated April 9th, 1829. From a cursory examination of that account, I imagine that if no charges had been brought against the fund between 1823 and 1832, except the support of the son and the annuity of \$100 to the mother, there would have been a surplus in 1832, sufficient to have paid the legacy of \$500 to the son, and leaving the fund of \$10,000 entire. The executor foresaw that in February, 1832, John H. Abeel would cease to draw upon the income for his support; and that he could diminish the capital only \$500; and the executor doubtless judged, that the income of the remaining capital, would in 1832 be more than Mrs. Howell could reasonably require, and the aggregate income after that period would suffice for any possible contingency in her support, for which the testator intended to provide.

It appears that the capital of the fund which remained after the payment of her son's legacy according to the executor's account, was \$8614 78. This sum at six per cent. would yield for her support five times as much as the testator designated in his will; and it cannot be doubted but the provision thus made by

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the executor in 1823, was a wise and provident exercise of the discretion reposed in him by the testator, and ample for any reasonable increase of Mrs. Howell's annuity.

I think it was, as to the utmost latitude of the allowance to her, a conclusive exercise of the executor's discretion ; but I need not so decide.

The Chancellor, when this estate was before him in 1829, (*Case v. Abeel*, 1 Paige, 393, 403,) evidently regarded the \$10,000 as a capital sum, the income of which was to be appropriated to Mrs. Howell and her son, so far as was necessary, and the principal to be divided among the residuary legatees of the estate.

The petition of Mr. and Mrs. Towle to the Chancellor in 1831, in which Mrs. Howell expressly concurred in writing, is a recognition of the act of the executor in setting apart the \$10,000 as a capital sum, which under the circumstances ought to be deemed conclusive upon them. They speak of Mrs. Weeks's one-fourth part of that fund, as being yet unpaid to her ; they allege that the annuity of \$100 is insufficient for the support of Mrs. Howell, and they pray for a reference to ascertain how much she shall receive yearly in future for her support, and they also ask for a suitable allowance for past expenditures.

The Chancellor made an order of reference accordingly, which was never prosecuted by the petitioners or by Mrs. Howell.

They chose to rely upon the exercise of Mrs. Towle's discretion as administratrix in regard to the extent of the yearly allowance, in preference to obtaining the judgment and sanction of this court. Whether Mrs. Towle could exercise any discretion on the subject, I need not say. I am clear that she could not trench upon the limit which the executor had imposed in the income allotted for this object, and which she as well as her husband and mother, had recognized and virtually adopted in their application to the Chancellor. And certainly, their omission to proceed under the order of reference, was an acquiescence in that limitation, which they ought not at this day to be permitted to retract.

These considerations induce me to concur fully in the conclusion of Assistant Vice-Chancellor Hoffman. The master will therefore be advised that he is not to allow to Mr. and Mrs. Towle

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any amount for Mrs. Howell's support, beyond the yearly income of the fund in question while she lived.

JAMES MASON v. JOHN MASON's Executors and others.

A testator having three sons and four daughters living, and six grandchildren the issue of a deceased daughter and of her husband, G., by his will gave to three of his daughters each one-fourth of his real and personal estate absolutely, and another fourth to G. and his children; and then devised and bequeathed the remaining half of his estate to his executors, in trust to rent, invest and improve the same, and receive and collect the rents and income, and out of the income, to pay yearly annuities, (unequal in amount, but each considerably less than one-eighth of the income,) to each of his three sons, J., H. and M. and to his daughter H. A. The latter was to cease on her surviving her husband, and she was then to take one-fourth of the half absolutely; and if her husband survived her, her annuity was to continue to him for life, and the eighth of the estate subject to that annuity, was to vest in her issue by representation. On the death of the sons J. or H. leaving a widow, she was to have the annuity of her husband, during her life. The trustees were clothed with a discretionary power to increase the annuities of the respective sons, and the daughter H. A., during their lives. If the net income of the trust fund exceeded the annuities, the surplus as to three-fourths accruing after a month from the testator's death, was to accumulate equally for the benefit of the issue of J., H., and H. A. respectively during their minorities, and to be paid to them respectively at twenty-one. So long as either of those three were without issue, the surplus of the income of their trust shares, after satisfying the annuities to them or the husband or widows, as the case might be; was to be paid to the three other daughters, and to the issue of H. A., to G., and to the issue of H. and J., if either had any; all taking *per stirpes*. On the death of M., who it was supposed would never have issue, the testator gave one-fourth of the trust fund, to the same devisees as last above expressed; and the surplus income of that fourth while he lived, was to go to the same persons and classes.

On the death of J. and H. respectively, other two fourth parts of the trust fund were given to their respective issue, subject to the respective annuities to their widows. But if either of those sons left no issue, the respective fourth parts, subject to the widow's annuities, were given to the three daughters first named, to G. or his issue, to H. A. or her issue, and to the issue of either J. or H. if any there were; all bestowed *per stirpes*.

Held, on the construction of the will, that the devise in trust of the half of the estate, was to be construed and taken as a devise of separate and distinct shares, each consisting of one-fourth part of such half, on distinct trusts in respect of each; and that the power of alienation was not suspended as to any portion of the es-

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tate, beyond two specified lives in being at the death of the testator; and that there was no absolute suspension for a month, or for any designated period.

The annuities to the two sons and the daughter, are not a joint charge upon the three-fourths of the trust fund; but each is a separate charge on the respective fourth parts given in trust.

Held also, that the trusts for the accumulation of the surplus income of the respective shares were valid. As to all the beneficiaries, the accumulations were to commence within two lives in being at the death of the testator; during the minority of the respective beneficiaries; and were to terminate as to each when he became of age.

It is a sufficient compliance with the provisions of the revised statutes as to such accumulations, if the persons for whom the same are intended, are designated or described as a class, *e. g.* as the children of a person named.

Where such a class is designated, it is not essential that all should be living when the accumulation commences; provided at the commencement it goes for the benefit of such as are *in esse* exclusively, and that those who subsequently become entitled fall within the prescribed rules laid down by the statute.

Such a succession of accumulations, is not objectionable, if they are all made to terminate within the prescribed limits as to time in respect of the suspense of the power of alienation.

Held also, that a devise in trust for the payment of annuities out of the income of real estate, is valid.

Words in a will importing a joint bequest or a union of interests, construed as bestowing separate and distinct shares and interests, from the nature of the things given, and the directions as to their disposition and enjoyment.

So words in the conjunctive, will be construed disjunctively and as distributive, when the intent of the testator requires it.

In the construction of a will, the extent and situation of the property, is a proper extrinsic circumstance to be considered in ascertaining the intent and object of the testator.

Where there is a devise and bequest to trustees, one of whom is to take a beneficial interest in the trust property, he takes a legal estate to the extent of such interest.

Oct. 10, 11, 1844, and Feb. 25, March 18, 1845; Decided April 3, 1845.

THE questions in this cause arose upon the will of John Mason, who died in the city of New York, on the 26th day of September, 1839. The will was in these words, viz:

"In the name of God, Amen—I, John Mason, of the city of New York, gentleman, being of a sound and disposing mind, memory and understanding, do, in and by these presents, make, execute, and publish my last will and testament as follows, that is to say:—

"First, I order and direct all my just debts, funeral expenses,

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and testamentary charges to be paid as soon after my decease as may be conveniently done.

"Second, I give, devise, and bequeath unto my beloved daughter, Mary Jones, the wife of Isaac Jones, and to her heirs, executors, administrators, and assigns for ever, the one equal undivided eighth part of all my property and estate both real and personal whatsoever.

"Third, I give, devise, and bequeath unto my beloved daughter, Rebecca Jones, the widow of Isaac C. Jones, deceased, and to her heirs, executors, administrators and assigns forever, one other equal undivided eighth part of all my property and estate both real and personal whatsoever.

"Fourth, I do give, devise, and bequeath unto George Jones, the husband of my deceased beloved daughter Serena, and to her children by him, and to their respective heirs, executors, administrators, and assigns for ever, one other equal undivided eighth part of all my property and estate both real and personal, whatsoever.

"The share, estate, and interest of the said George Jones in the said last mentioned eighth part to be the same in right of his said deceased wife as if she were now living and should survive me, to the end that he may not be prejudiced by her death before me, touching her share and portion in my estate and property, either real or personal, the said children taking under this my will, their respective shares, estates and interest in the real estate of the said last mentioned eighth part only after the death of their said father, equally, or share and share alike.

"Fifth, I give, devise, and bequeath unto my beloved daughter, Sarah Jones Hamersley, the wife of Andrew Gordon Hamersley, and to her heirs, executors, administrators and assigns for ever, one other equal undivided eighth part of all my property and estate both real and personal whatsoever.

"Sixth, The remaining one equal undivided half part of all my property and estate, both real and personal whatsoever, I give, devise, and bequeath unto the said Isaac Jones, George Jones, and Andrew Gordon Hamersley, and the survivors and survivor of them, their and his heirs, executors, administrators

and assigns, for ever, in trust for the following uses and purposes, that is to say:

“To rent, invest and improve the same, at their and his best discretion, and collect and receive the rents, issues, profits, interest, dividends, or other income thereof, and by and out of such income, or so much thereof as may be necessary for that purpose, to pay the following annuities, that is to say:

“To my beloved daughter, Helen Alston, the wife of Joseph Alston of South Carolina, for her own separate use and benefit, and into her own hands, and upon her own receipt, or to her own written order, to be given by her from time to time as such payments shall be made, and not by way of anticipation, a clear annual annuity of three thousand dollars a year;

“Also, to my beloved son, John Mason, Junior, a clear annual annuity of two thousand dollars a year;

“Also, to my beloved son, James Mason, a clear annual annuity of two thousand five hundred dollars a year;

“And, also, to my beloved son, Henry Mason, a clear annual annuity of two thousand five hundred dollars a year.

“Each of the said four annuities to be paid in two equal instalments a year, at the end of every six calendar months from and after my decease, and to continue during the respective lifetimes of the before named four annuitants, with the exception of the said Helen Alston, whose annuity shall cease when and if she survive her said husband, and she shall thereupon become entitled, and I hereby in that event give, devise and bequeath to her and to her heirs, executors, administrators and assigns, for ever, the one equal undivided fourth part of the said half part of my property and estate, both real and personal.

“But should her said husband survive her, then from and after her decease, I hereby order and direct the said annuity of three thousand dollars a year, to be paid to him in like semi-annual instalments for and during the residue of his natural life.

“And upon the decease of the said Helen Alston, should she die in the lifetime of her said husband, I hereby give, devise, and bequeath the said last mentioned one equal undivided fourth part, of the said half part of my property and estate, both real

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and personal, subject to the said annuity to her surviving husband, to her child or children, or other issue, and his, her, or their respective heirs, executors, administrators and assigns for ever, share and share alike; such other issue taking by representation and not *per capita*.

"And with regard to my said two sons, James Mason and Henry Mason, should they or either of them die leaving a widow surviving them or him, such widow or widows shall be entitled to, and I hereby give and bequeath to her or them respectively, the same annuity of two thousand five hundred dollars a year, to be paid to her or them respectively, in like semi-annual instalments, during the residue of her or their several natural life or lives.

"And I do hereby give to the before named trustees and the survivors and survivor of them, full discretionary power to increase the said annuities respectively, during the lifetimes of my said daughter Helen Alston, and my said three sons, John Mason, Junior, James Mason, and Henry Mason, but not after their respective deaths.

"And should the clear net income of the said trust fund exceed the said annuities, the surplus in regard to the three equal fourth parts thereof accruing after one month from my death, is to accumulate equally for the benefit of the children or other issue of the said Helen Alston, and James Mason and Henry Mason respectively, during their respective minorities, and to be paid to them respectively as they shall severally attain the age of twenty-one years, such children or other issue taking their respective shares thereof by representation and not *per capita*.

"And with regard to the said trust shares of the said Helen Alston, James Mason and Henry Mason, so long as they may severally be without issue living, the surplus of the said income thereof accruing as aforesaid from one month after my death, after satisfying the said annuities to them, or to the surviving husband of the said Helen Alston, and the surviving widows of the said James Mason and Henry Mason, shall be paid from time to time to the said Mary Jones, Rebecca Jones, George Jones, if he be living, or to his children by my said deceased daughter, if he be dead, the said Sarah Jones Hamersley, and the

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said Helen Alston, should her said husband be then deceased and she survive him, or to her issue if she and her said husband be both living, and she have issue living, and to the issue of either of my said sons James Mason and Henry Mason, who may have issue, equally, or share and share alike, such issue in each instance taking by representation and not *per capita*.

“And upon the decease of my said son John Mason, Junior, who is unmarried, and from his bodily and mental infirmities, in all human probability never will be married, I give, devise and bequeath the one equal fourth part of the said remaining half part of my property and estate, both real and personal, together, in the meantime, that is to say, during his lifetime, and the surplus of income thereof, after satisfying the said annuity to him, to the several persons, and for the several estates, and upon the several contingences herein lastly above specified.

“And upon the deaths of the said James Mason and Henry Mason respectively, I give, devise and bequeath the two equal fourth parts of the said remaining half part of my property and estate, both real and personal, to their respective issue, such issue taking share and share alike, by representation, and not *per capita*, subject to the said annuities, to the widows of my last named two sons, should such widows survive them.

“But should my said last named two sons, or either of them, die without leaving any issue them or him surviving, then I give, devise and bequeath the said last mentioned two equal fourth parts or one equal fourth part of the said remaining half part of my said property and estate, both real and personal as the case may be, subject to the said last mentioned annuities, to the said Mary Jones; Rebecca Jones; George Jones, if he be then living, or if then dead, to the children of my said daughter Serena; Helen Alston, if she shall have survived her said husband, and if not, then to her issue; the said Sarah Jones Hamersley; and the issue of either of my last mentioned two sons who may have left issue; equally, share and share alike, the issue or children in either case taking by representation and not *per capita*.

“Lastly, I do hereby nominate, constitute and appoint the said Isaac Jones, George Jones, and Andrew Gordon Hamersley,

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executors, and my said two daughters, Mary Jones and Rebecca Jones, executrixes of this my last will and testament, hereby giving them power and authority at their discretion, to sell and convey all or any part or parts of my real estate. And I hereby revoke every former will by me executed.

"In witness whereof, I have to these presents set my hand and seal, this twenty-sixth day of September, in the year of our Lord one thousand eight hundred and thirty-nine.

JOHN MASON, (L. S.)

"Signed by the testator, at the end hereof and by him sealed, executed, published, and declared as and for his last will and testament in our presence, who in his presence, and at his request and in the presence of each other, have hereto subscribed our respective names as attesting witnesses, adding to our respective names our places of residence, the day and year lastly above written. FRANCIS E. BERGER, 68 Warren-street; GEORGE W. STRONG, No. 109 Greenwich-street, city of New York."

The complainant was one of the sons of the testator named in the will. In his bill filed March 24, 1840, he stated that the executors proved the will and obtained letters testamentary. That a large portion of the real estate was demised at the death of the testator, but the complainant was ignorant of the particulars and required a discovery. That the devise of the testator both as to his real and personal estate, was utterly null and void and of no legal effect or validity, and the complainant upon his death became seised of one-eighth of the real estate as tenant in common and entitled to one-eighth of the rents of such as was demised. That the other heirs or some of them have received the whole rents, and he has called on them for an account and payment.

The bill prayed that the devises and bequests of the will might be declared void, and the complainant's title established, and for an account of the rents received. Also that the true construction of the will might be declared and determined by the court.

The parties defendant in the suit, were the three executors, the six children of the testator named in the will as being then alive, Joseph Alston also named in the will and his infant son, the wife of Henry Mason and his infant daughter, the wife of

the complainant, and the six children of Serena Jones the deceased daughter of the testator.

The executors, with the parties who took absolute vested interests under the will, put in answers, insisting on its validity in every particular. The executors stated that under the discretionary power in the will they had increased the annuities to one-eighth of the net income.

It appeared that the personal effects of the testator were inventoried at five hundred and sixty-six thousand five hundred and thirty-eight dollars; and that his real estate was worth about half a million of dollars. It also was stated at the hearing, that the executors during the progress of the suit, had reduced the annuities payable to the sons and Mrs. Alston to the sums specified in the will.

James J. Ring, for the complainant.

The testator has devised one-eighth of his estate to each of his four daughters first named, including the husband and children of Serena Jones, absolutely. The second division of the will consists of a devise of one-half of his whole estate to three executors as trustees, upon certain trusts which present the questions now at issue.

We contend that this devise to the trustees is void, both as to the real and the personal estate.

I. The directions to pay annuities out of the rents and profits of the trust property does not support the devise.

1. The trust to pay annuities, a fixed annual sum, out of rents and profits, is not a purpose enumerated in part 2, chapter first, article 2, title 2d, of the revised statutes.

It is not a trust for alienation.

It is not an application of rents and profits or any specific part of them, but is a charge upon them.

The payment of a gross sum to an annuitant is not an application to his use.

2. Such devise would vest the whole estate in fee in the trustees under the sixtieth section of the title relative to Uses and Trusts; no matter what were the disproportion between the annuity and the yearly value of the land; or,

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3. It renders it impossible to determine what proportion of the estate is left in the grantee or his heirs which is not necessary for the purposes of the trust. (See § 62 of same title.)

II. The power to enlarge the annuities will not support the trust, as the enlarged amounts are merely substituted for the original.

III. The attempted disposition of the residue of the rents and profits will not support the devise.

1. The provision for accumulation is void.

First, for uncertainty of what is to accumulate and of the persons to take; and *secondly*, for too long postponement of the commencement.

2. The provisions for the distribution of some portion of the income during the time Mrs. Alston, James and Henry are without issue, is void.

First, for uncertainty as to what is to be paid, and the persons to take, and as to the contingency authorizing the payment.

Secondly, being for the benefit of issue not in existence at its creation, it cannot be determined who is to take.

3. The trustees are also *cestuis que trust*, under the devise.

4. The devise of one-fourth of the one-half, on the death of John Mason, Junior, is void for uncertainty and incomprehensibility.

5. The devise of two-fourths of one-half, on the deaths of James and Henry to their issue is void.

First, no provisions are made for the estate between their deaths respectively.

Secondly, it is contradicted by the next clause of the will.

Thirdly, it is part of a general purpose which has failed.

6. The devise on the death of either of those sons without issue, is void.

First, for uncertainty as to what passes, whether one or two-fourths; and the persons to take.

Secondly, as being part of a general purpose which has failed.

Thirdly, Because of its contradicting immediately, the preceding provisions.

IV. The complainant, James Mason, takes one-eighth of the testator's real and personal estate as heir at law.

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V. At all events, the trustees having increased the annuities to the complainant to the extent of one-eighth of all the income of said trust fund, he is entitled to a decree for the payment of the enlarged annuity. The trustees have no right to diminish it, after once enlarging it. The testator did not intend to place his sons in such a state of vassalage as would result from a different construction.

The counsel cited *Coster v. Lorillard*, 14 Wend. 265, 331, 333, 352; *Hawley v. James*, 16 ibid. 61, 161, 173; *Stuyvesant v. Salmon*, 16 ibid. 321; 1 Rev. Stat. 728, 729, § 55, 57, 60, 62, 63; *Wilson v. Piggott*, 2 Ves. jr. 351; *Fortescue v. Gregor*, 5 ibid. 553.

B. Robinson, for Mr. and Mrs. Alston concurred in the grounds taken by the complainant.

J. V. L. Pruyn and *J. C. Spencer*, for Henry Mason.

I. The devise of one-half of the testator's estate in trust to pay annuities to more than two persons during their lives, suspends the power of alienation for more than two lives in being, and is void.

Here there are *four* annuitants in the first instance, absolutely. If Mr. Alston survives his wife, then the annuity continues to him during life, and the widows of James and Henry, are also contingently entitled to annuities on the death of their husbands.

The devise is *of the whole* of this half of the estate, in trust to pay the different annuities. It is a joint devise, and not of several portions of the several annuities, so that if the gross income should be less than \$10,000 in any one year, a proportionate abatement must be made in each annuity. They are each and all charged upon the whole estate. By section 36, tit. 2, chap. 1, part 2, of the revised statutes, dispositions of the rents and profits of lands, are to be governed by the rules in that article relative to future estates in lands.

By section 15 same title, the absolute power of alienation shall not be suspended by any limitation *or condition* for a longer period than two lives in being at the creation of the estate.

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And by section 14 of the same title, any estate by which such a suspension is caused, shall be void in its creation.

By section 1 of tit. 4, chap. 4, part 2, of the revised statutes, the absolute ownership of personal property, shall not be suspended by any limitation or condition whatever for a longer period than two lives in being.

And by section 2, in all other respects limitations of future interests in personal property, are subject to the rules prescribed in chap. 1, part 2, respecting future estates in land. See *Van Vechten v. Van Veghten*, (8 Paige, 128,) that the effect of this clause is to render void an estate or interest in personal property by which an illegal suspension is created.

Upon the subject that this devise creates a *joint charge* upon the whole fund, I can add nothing to what has already been said, except to refer to and adopt the remarks of Senator Maisson, in the case of *Hawley v. James*, (16 Wendell, 258.)

This joint charge renders the principal of the fund inalienable during the lives of the four annuitants.

1. The annuitants cannot alienate their interest. The 63 section of the same title 2, declares that "no person beneficially interested in a trust for the receipt of rents and profits, can assign, or in any manner dispose of such interest."

Here is a clear trust to receive rents and profits. There is no vestige of an authority in this will to sell, or to lease or mortgage lands to pay charges.

On this subject, I refer to and adopt the remarks of Justice Bronson, in 16 Wendell, 161, beginning, "There is still another reason," &c., and also at p. 165, the remarks also of Ch. J. Nelson, p. 117, beginning "The trust to pay annuities," &c.

That the annuity is not a sum in gross, in addition to what J. Bronson says at p. 165, I refer to and adopt the remarks of Senator Maisson, at p. 262, beginning "We now come to the 63d section," &c.

These annuities are *several* sums payable every six months, and not a sum in gross.

They are uncertain in amount, the trustees having a discretion to increase them.

If the case of *Hallet v. Thompson*, (5 Paige, 585,) is relied upon,

to show that the interest of the annuitants is assignable, I refer to and adopt the conclusive argument of Senator Maison, beginning at p. 260 of 16 Wendell, beginning "Such would be precisely the case," &c.

I add the following remarks: It may be seriously questioned whether the devise in *Hallet v. Thompson*, was not a gross sum of \$4000, since Thompson could render it *gross* by calling for it at any time.

Again, the Chancellor in that case considered that the income of the \$4000 was not intended for the support of Mr. Thompson.

In this case, the annuities are clearly for that purpose.

The case therefore, is not strictly applicable to the questions arising under this devise.

If it be applicable to a *trust* to receive rents and profits under sub. 3 of sec. 55 of tit. 2, then it is overruled by the opinions before quoted in 16 Wendell, and the decision of the Court of Errors, in *Coster v. Lorillard*, 14 Wendell, see p. 329, opinion of Ch. J. Savage, and the decree of the court by which the annuities were set aside, which were drawn in question. And in fact, it is virtually overruled by the Chancellor in *Van Eps v. Van Eps*, (9 Paige, 240.)

The decision in James's case, p. 275, which saved the annuities, devised a mode of doing so, which exonerated the estate from the charge at once. This was done under the peculiar language of the will, see Senator Maison's opinion, p. 256, and at p. 259, and because all the parties and their counsel were desirous that these small annuities, out of such a large estate, should be paid; and every one, instead of making an objection, lent his aid to give them effect. The court could not have directed the purchase of an annuity, or the leasing of lands, to produce one, if they had not supposed the will contained such a power to the trustees. Whether it did in fact, give such a power, is not so material. If the court mistook the fact, it does not vary the principle on which they proceeded.

We are therefore led to the next question in order.

2. That by the 65th section of title 2, the trustees have no power to alien any part of the estate. In this will there is no indication of any authority to dispose of any part of the half, and

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there are no words by which such implication can possibly arise. There is no direction to "secure" the annuities, or any thing of the kind.

Any alienation of the estate or any portion of it, by the trustees, would therefore be in "contravention of the trust."

And even if the interest of the annuitants be assignable, yet the trust term must be maintained to pay over the annuities to the assignees.

The possibility that the annuitants might release and extinguish their claim, cannot relate back to render valid the creation of the estate.

There is a possibility also, that they will not release, and therefore hold on to their annuities as long as may be, and this very possibility, that the trust term may continue more than two lives in being, renders it void. See remark and quotation of Ch. J. Nelson, p. 121, 16 Wendell, second line from the top.

Upon the point now mentioned, I refer to the remarks of Ch. J. Nelson, p. 122, of 16 Wendell, beginning, "Even if we should concede," &c.

And in reference to this whole point, the decision in *Van Vechten v. Van Veghten*, (8 Paige, 104,) in respect to the house and lot in Market-street, is directly applicable, and is conclusive.

II. The trust for accumulation of three-fourths of the one-half of the estate for the benefit of unborn children, is at least questionable. I do not propose to argue it at length; indeed I do not find that the point has been the subject of adjudication.

The question is whether under the 2d subdivision of section 37 of title 2, chap. 1, and under the 2d subdivision of section 3 of title 4, chap. 4, part 2, "the persons" during whose minority the accumulation must commence, and at the expiration of which it must terminate, must not be named—specified?

III. The suspension for *one month* after the death of the testator, is void. The settled construction of the revised statutes is that the suspension cannot be for any definite time, long or short, but must be determinable upon lives in being. It is only necessary to refer to the case of *Hone's Executors v. Van Schaick*, (20 Wendell, 565,) and to *Irving v. De Kay*, (9 Wendell, 527,) to show that such is the settled law.

IV. If the devises of the will are void in part, so that the whole intention of the testator cannot be executed, the whole will becomes inoperative, as otherwise there will be an unequal distribution of the estate among the testator's children, contrary to his evident intention. This proposition is not in conflict with the opinion of the Chancellor in *Irving v. De Kay*, in 9 Paige, 526. That opinion is, "that *any* legal trust is sufficient to sustain a devise to a trustee commensurate with such trust, without reference to the illegal trusts which the testator has attempted to create in the same estate." That is, that if there be any legal objects of a trust, it may be sustained, although there may be other illegal objects or other illegal terms or limitations inasmuch as these are merely void.

The Chancellor accordingly qualifies his first proposition by saying that "although *some* of the objects for which a trust is created, or some future interests limited upon the trust estate, are illegal and invalid, if *any* of the purposes for which the trust was created are legal and valid, the legal title vests in the trustees during the continuance of such valid objects of the trust."

Now, in this case, we are not dealing with the *objects* of the trust, at least so far as the first point is concerned, but with the *means* adopted to accomplish those objects. An annuity is a lawful object of a trust. But the tying up of an estate during four lives is an illegal limitation in itself, without reference to its object.

The *condition* of paying the four annuities, is a suspension of the power of alienation and violates section 15 of title 2.

Admitting for the purpose of the argument, that the object and purpose of the devise to pay over the surplus of the rents and profits to Mrs. Jones and others, during the time that Mrs. Alston, James and Henry shall have no issue living, is valid; yet this very authority to pay over is to continue during the lives of the four annuitants, depending upon the same limitation of the continuance of the estate, as the annuities themselves. The same remark applies to all the contingent devises and directions in regard to the surplus of the income. Besides, all these devises and directions are so mixed up with the devises of annuities,

that it is impossible to sustain the one set, without giving effect to the other.

But the radical vice of the devise is that it *per se* suspends the power of alienation by a condition which would continue the estate in the trustees for more than two lives in being.

It is not a case therefore, where some *objects* of a trust are valid and others are invalid, but the whole trust term is in itself invalid.

Still, it may be urged that in the cases which have occurred, where trust terms have been declared void, not on account of their objects, but on account of their duration, other devises in the same will have been held valid and sustained by the court. The first one of this class is *Hone's Executors v. Van Schaick*, (20 Wendell, 568.) There devises of specific legacies to grandchildren, were maintained, notwithstanding the trust term for other persons was held void. But as J. Bronson remarked, this was an entirely independent provision, not dependent either upon the trust term or upon any of the other devises. Its being maintained in no way interfered with the intention of the testator, either special or general, but carried it out. His original intent was that no part of the sum constituting these legacies should go to his children. No inequality among the children was produced by sustaining these legacies.

The next is the case of *Gott v. Cook*, (7 Paige, 521,) in which case the contingent limitation to the children of a deceased niece and to her surviving husband, formed no part of the integral devises, and was in no way connected with the main devises of the will. It could not be said that any of the other devises were or could have been made in contemplation of this being valid and effectual. The general intention of the testator was not therefore disturbed.

The next case is that of *Van Vechten v. Van Veghten*, (8 Paige, 104.) The destruction of the trust in relation to the house in Market-street, merely divided the principal among the heirs at law, the children, instead of the income. At p. 129, the Chancellor says: "No material change in the disposition which the testator intended to make, will be produced by separating the unauthorized trusts, &c."

So in *Irving v. De Kay*, (9 Paige, 521,) the invalidity of the term of suspension until 1840, had no operation whatever upon the bequests and devises of the will, produced no inequality, and did not interfere with the general or special intentions of the testator.

All the remarks of the Chancellor on this subject, rest upon the case of *Darling v. Rogers*, (22 Wendell, 485,) in the Court of Errors, which after all, must guide us in determining whether that court intended to establish a different rule from that which had been adopted and applied in the *Lorillard* case and in the *James's* case. In that case the trust was created to pay debts; that was the object and the general intention. To effect this intention the trustees were empowered "to *sell* and dispose of the estate real and personal, or to *mortgage* the real estate" and from the proceeds to pay creditors. It was held that the authority to *sell* was valid, though that to *mortgage* for general creditors was bad, while it would be good to satisfy judgments or other charges; (see the decree and resolution at the end of the case.) And it was further held that this authority to mortgage did not taint the one to sell. It is very obvious that the failure of this power to mortgage did not in the least interfere with the general intent. It was one of the modes in which the grantor sought to carry out his object; but he also provided another mode which was legal. This intent was executed in either way.

The true rule is given by Senator Verplanck at p. 495 of that case, "that when a *will* is good in part and bad in part, the part otherwise valid is *void*, if it works such a distribution of the estate, as from the whole testament taken together, was evidently never the design of the testator." And as he says, this doctrine was applied in the case of *Coster v. Lorillard*.

Ch. J. Nelson, p. 348, (14 Wendell,) says, that the court is not to shut its eyes as to the effect upon other parts of the will, by attempting to carry out a part of it: and all his remarks at pp. 348, 349, are applicable.

But the remarks of Senator Young at p. 391, 392, are particularly relied upon, not only as authority, but for their good sense and justice. I could not add a word to their force and therefore decline the attempt.

But so far did the court carry the principle of declaring the whole will void, that the life estates of the several tenants for life, in the lands, &c. devised by the 7th article of the codicil were void; (see the decree, and the part in italic, at the end of the case.) Although no one had questioned their validity as separate and independent devises, yet retaining them while all the other parts of the will were destroyed, would not have accorded with the general intention of the testator, and they were therefore abrogated.

So in the case of James's will, Ch. J. Nelson, at p. 141, says, "I can never consent to modify and maintain last wills and testaments, where the intent of the testator is thus palpably defeated, and where great injustice must be the consequence to a portion of his descendants."

J. Bronson's remarks, p. 145, 146, show that he had come to the same conclusion, although in the view he took, that the *whole was void*, he did not deem it necessary to consider the effect of a bad part upon that which was good.

But perhaps the best evidence of the opinion of the Court of Errors, is to be found in the fact, that the Chancellor in *Irving v. De Kay*, (9 Paige, 527, 528,) endeavors to show that a different rule had been established in *Darling v. Rogers*.

I have already examined that case, and shown I think, that it is not applicable at all to the question of the general intention of the testator, and that Mr. Verplanck, who gave one of the opinions, drew the distinction which I mention. See *Osgood v. Breed*, 12 Mass. Rep. 534; 1 Russell, 217; 1 Tamlyn, 261; on this point.

In the present cases, it is obvious that to set aside the trust term in relation to one-half of the estate, and maintain the first four devises, a gross and monstrous inequality will be produced, and the intent of the testator frustrated. The result of such a decision would be that Mary Jones would receive one-eighth part of the whole estate, by virtue of the devise to her, and also one-eighth of the half devised in trust; that is, she would have one share and one-half share of the estate, while Henry would receive one-half share, and thus Mrs. Jones, and the other three first devisees

named, would each receive three times more than Mrs. Alston, James or Henry.

It cannot be denied that the different parts of this will constituted one plan; that the four first devises were made in contemplation of the other provisions for the other children, and that the parts are mutually connected and dependent on each other, and that neither of them, the first four devises or the trust term, could be struck out without marring and frustrating the testator's main and chief intention.

The strong language of Senator Verplanck, and of Senator Young, in the cases already quoted, are very applicable to this result, and leave nothing for me to say upon its injustice and downright iniquity.

M. S. Bidwell and *D. Lord, Jr.*, for the executors and trustees of John Mason; also for the committee of John Mason, Jr., and for sundry infant defendants, made the following points.

First. 1. The estate is divided in four eighth parts, given by way of direct legal estate, and four by way of trust estates.

2. The shares given in trust, are distinctly and separately appropriated, one to each of the children named as *cestui que trust*, and their issue, &c. (*De Peyster v. Clendinning*, 8 Paige, 306; *Bulkley v. De Peyster*, 26 Wend. 21.)

3. The trust to improve the property, to receive the income, and to pay over the same to the annuitants and donees of the surplus, is valid as a mode of disposition. (1 R. S. 729, § 56, 55, 53. *Kane v. Gott*, 24 Wend. 641.)

Second. 1. The trust for Helen, Mrs. Alston, is to pay her an annuity of \$3000 during the joint life of her and her husband, to accumulate the surplus during the minority of her children, to pay it to them on their attaining full age; and it is valid. (1 R. S. 729, *ubi supra*, and 723, § 15, 17; 726, § 37, subd. 2.)

2. This trust, during the time she might be without issue, to pay to other persons designated, being dependent on the life of Alston, is unobjectionable. (1 R. S. 723, 726.)

3. The provision in case of her husband surviving, to pay him the annuity for his life, if it requires the estate to continue in the trustees for his life, is nevertheless unobjectionable. It is but a

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second life in being, and the remainder in the issue, is vested on the mother's death. (1 R. S. 723, *ubi supra*.) But is a new charge or a legal remainder given to her children.

4. The gift of the remainder in fee, as a legal estate after the death of Mrs. Alston, if she survived her husband, or on her death, if she did not survive him, was valid; vesting the remainders in her children on their birth respectively, and during her life, and is clearly unobjectionable.

Third. 1. The trust for James Mason, is to pay him an annuity of \$2500 per annum for life, the surplus of the income of one-eighth over the annuity, to his issue, to accumulate until the issue come of age, and to be then paid to them was valid. See point 2d, subd. 1.

2. The trust, while he should be without issue, being limited to his life, is unobjectionable.

3. The gift of the remainder in fee, on his death to his issue, subject to the annuity to his widow surviving, is valid; vesting remainders in his issue as they are born respectively. It terminated the trust.

4. The gift on his death, without issue to Mary, Rebecca, George (or his children,) Helen (or her issue,) Sarah, and the issue of Henry, by representation, is a limitation not beyond one life in being, and is a valid contingent remainder.

5. The annuity to the wife of James, is not by way of a trust to be performed by the executors, but a charge directly upon the legal vested remainders, taking effect on his death, and is valid.

Fourth. The interest of Henry Mason, and his wife and children, &c., stands in all respects like that of James.

Sixth. 1. The trust to pay John an annuity of \$2000 per annum, is unobjectionable.

2. The gift on his death, of the eighth, and the surplus over the annuity in the mean time during his life, to Mary, Rebecca, George (or his children,) Sarah, Helen (or her issue,) the issue of James, and of Henry, being a remainder to take effect on a single life, is clearly valid: vesting on the testator's death and on the birth of the issue defined.

3. Although there is a confusion of words in this clause, the meaning is both clear and unambiguous.

There is a clear intent to give, 1. A remainder in fee on the death of John. 2. The surplus of income, in the mean time during his life. 3. The objects of the gift are clearly defined, and the same persons for both.

Seventh. The discretion to the executors, is wholly unobjectionable in law, applying severally to each share put in trust, and terminating with the life of each of Mr. Mason's children. (1 R. S. 734, § 95, subd. 2.)

To the argument of Mr. Spencer in behalf of Henry Mason, the counsel for the executors, made the following reply.

I. The provisions of the will, in respect to the annuities, do not suspend the absolute power of alienation beyond the period prescribed by law, and are not void.

1. The law regards things, not names: the intention of the parties, not the phraseology in which it is expressed. This doctrine is peculiarly true, in regard to the construction of wills, which are often drawn in haste, and by persons not accustomed to such business.

It was clearly the intention of the testator, that his estate should be divided by his will into eight equal parts: four of which he gave absolutely, and the other four he put in trust. As the last four were all put into the hands of one set of trustees, and were, during the continuance of all the trusts, held by them in common, and undivided, the draftsman of the will, for the sake of convenience and brevity, in one place, when speaking of them in contradistinction to the four eighth parts in which legal and absolute estates were given, described them collectively, by the expression "one equal undivided half part," instead of using the term "four equal eighth parts." The expression itself, in the place in which it is used, is perfectly proper, and affords not the slightest ground for the conclusion attempted to be drawn from it, that the *whole* trust property was to remain in the hands of the trustees, until all the annuities were terminated. These four trust shares did constitute, according to the most exact use of language, "an equal undivided half part," and yet, with equal truth and accuracy, they are four several though equal undivided eighth parts, and accordingly, in other parts of the

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will, where such a distinction would properly be observed, they are described or alluded to, as several and distinct shares.

That they were in fact intended by the testator to be several and distinct shares, each chargeable with one annuity, not *all* chargeable and to be held in trust for *all* the annuities, is demonstrable from the provisions of the will. Take, for instance, the case of Mrs. Alston: upon her death, one of these shares vests absolutely in her issue; the trusts cease, and the legal estate vests *eo instanti* in her issue; subject, indeed, to the charge of the annuity to Mr. Alston, if he should then be living, but not, even for that purpose, held by the trustees in trust, or being, in any respect, liable for the other annuities. And the same reasoning applies to the other shares and the other annuities.

It is true that, while these several shares remain in the hands of the trustees, they are held by them in common and undivided. But this is the case of all estates, real and personal, held by tenants in common.

They are, nevertheless, as truly several and distinct estates, as if each share and estate was a separate piece of land. One share is held by the trustees, during the life of a certain person who is named and who was in being at the creation of that share or estate; another share is, in like manner, held in trust during the life of a certain other person, who also was named and was in being at the creation of that estate; and the same may be said of all the shares; but no one of them is to be held in trust during the continuance of the lives of all four annuitants, or of more than two lives in being at the creation of the estate.

Can reasoning be more plain or more conclusive? Does it require to be enforced by judicial authority?

If it does, the judgments of the Chancellor and the Court of Errors in the case of *De Peyster v. Clendining*, furnish a most explicit decision of the highest authority, upon this very point. (8 Paige, 306; S. C. *nom. Bulkley v. De Peyster*, 26 Wend. 21.)

The fact that, in the learned and elaborate arguments in behalf of Henry Mason, not the least allusion is made to this decision, which is so applicable and so conclusive, is an admission that it cannot be answered or explained away.

2d. But, if all the four shares remained in the hands of the trustees, chargeable with, and until the termination of each and all these annuities, the absolute power of alienation would not, on that account, be suspended beyond the period allowed by law.

There is no contingency as to the annuitants or their rights; both were ascertained and fixed by the will. These annuities they can release.

It is no objection that the annuitants may not choose to do this; for, if that made the estate inalienable, then every gift of property would be inalienable. They have the legal capacity, the power to do this, and thereby to determine the trust. The *power* of alienation, therefore exists; it is not absolutely suspended. The case therefore cannot come within the language of the statute, or the mischief intended to be guarded against by it.

Even if the annuitants were under the disability of infancy or coverture, that disability, according to an express decision of the Chancellor, in the case of *Boyer v. Smith*, decided April 4th, 1843, would not suspend the power of alienation, within the meaning of the statute; because infants and *femes covert* can, with the aid of the court, alienate their property.

There are therefore, persons in being, who, if they choose, by the use of legal means, can remove every difficulty or impediment in the way of an alienation of the estate. This the testator provided for in the will. Therefore, if the estate or any part of it should not be alienated, it will not be because there is not a *power* of alienation, but because those who have this power do not choose to exert it.

II. The trust for the accumulation for the benefit of unborn children is valid.

It commences within the time mentioned in 1 R. S. 726, sect. 37, subdivision 2: for instance, as to one-eighth part, it must commence, if it should ever commence, during the continuance of Mrs. Alston's life, because, upon her death, the legal estate itself in that share, will vest in her issue; and so of the other shares.

And it will not commence *before* the minority of the child, that is, before the birth of the child, because, according to famil-

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iar and well settled principles of law, the accumulation which accrues previous to such birth belongs to the children then in being, and children subsequently born are let in, only to a share of the subsequent accumulation.

But if the direction for this accumulation were invalid, the will itself would not, on that account be void. The case would then come within the operation of 1 R. S. 726, sect. 40, and, so far as the provision was invalid, the rents, &c. would belong to, (not accumulate for,) the persons presumptively entitled to the next eventual estate; as for instance, in regard to the accumulation for Mrs. Alston's children, they would belong either to Mrs. Alston herself or to her children; to which of them they would belong, would depend upon the question whether she, or her children, should be deemed to be presumptively entitled to the next eventual estate.

It is neither necessary nor proper to inquire or to decide in this case, who would be entitled to the rents, &c. if any or all of the accumulations should be void; or whether they are void; because the complainant clearly is not presumptively entitled to the next eventual estate in respect to any of the shares; and as this bill is not filed by the trustees to settle the construction of the will, it is sufficient to know that the complainant can have no interest in the question, and, therefore, can have no right to ask the court to pass any opinion upon it. (*Bower et ux. v. Smith*, before cited, decided by the Chancellor, April 4, 1843. *Parks v. Parks*, 9 Paige, 120.)

III. It is assumed in the argument in behalf of Henry Mason, that there is an absolute suspension of the power of alienation for one month after the death of the testator.

But there is no such suspension.

Upon the death of Mrs. Alston, whether within one year, one month, or one hour, after the testator's death, one share vests absolutely and immediately in her issue; and so in regard to the other annuitants, the respective shares, upon their respective deaths, vest immediately (and not after one month from the testator's death,) in the persons to whom their respective estates are given.

There is no ground therefore, for assuming that there is an

absolute suspension of the power of alienation for a single moment after the testator's death.

The duration of the trust as to each share, depends entirely upon the continuance of one or at most two lives in being.

The direction for the accumulation accruing after one month from the testator's death, is evidently intended to take effect as to each eighth part only in the event of the continuance of the respective lives of the several annuitants; it does not extend the trust one moment after the death of any annuitant as to the share given over upon such death.

IV. But if the trusts are all void, the other parts of the will, which are not dependent on or connected with them, are valid.

The testator had a right, undoubtedly, to bestow one-half of his property upon four of his children; to secure this portion to them absolutely; and to leave the other half of his estate undisposed of, to be distributed under the statute of distributions. In such a case, the four favored children would take under the will, notwithstanding their right to share under the statute of distributions. (*Bristow v. Ward*, 2 Ves. jr. 336.)

And, in like manner, what the testator has given according to law by this will, cannot be taken away from the donees, on account of his having, intentionally or unintentionally, omitted to dispose of the residue of his estate, although some or even all of these donees will likewise be entitled under the statute to a share of such residue.

Whether they would be allowed to claim and take under some clauses of the will, and at the same time to claim in opposition to other clauses, upon the ground of their invalidity, may be doubted. A court would perhaps put them to their election, and require them either to abide by the will altogether, or to renounce all benefit under it. (2 Sugd. on Pow. (6 ed.) 159, 160; Taylor's Precedents of a Will, 379, 384, in notes.)

But it would be unjust and unreasonable, as well as an usurpation of power on the part of a court, to set aside the valid provisions of the will in their favor, merely because *other persons* do not choose to accept what the testator has given to *them*, and voluntarily dispute its legality.

Whence does a court derive authority thus to disregard and

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repeal the testator's will? Not certainly from the common law; that sustains and gives effect to the valid parts, although the most important parts of the will may be void. Nor has the legislature given such a power to any court. On the contrary it has expressly directed courts "to carry into effect the intent of the party *so far* as such can be collected from the will, and is consistent with the rules of law." (1 R. S. 748, sect. 2.)

The distinction is plain and familiar between an enactment which declares a contract or a trust, &c. void, and one which declares void the deed or instrument containing the invalid provision. Although the legislature has declared certain trusts void, it has not declared that the will itself which contains them, or that other independent provisions in such a will shall be void.

The argument against these valid provisions from the presumed intentions of the testator is dangerous, inconclusive and unwarrantable.

Undoubtedly, the testator might in all such cases, provide in the alternative for a different disposal of his estate, if certain provisions of his will should be pronounced void; but the very fact of his not inserting in his will such an alternative provision is a reason why the court should not interfere, with what he has lawfully done.

Defects in wills have often been discovered, which were ascribable, on the strongest grounds of probability, to inadvertence or ignorance; but courts have never attempted on such presumptions, to supply these undesigned omissions. (18 Wend. 255.)

Besides, if the argument is of any weight, it will apply to all wills, which contain a single provision, that is invalid or that fails to take effect. If not, what proportion must the valid part bear to the invalid, in order to be exempt from this destroying rule?

If, in answer to this question, no certain proportion can be assigned, every thing must depend on the arbitrary discretion of the judge, or every will must be altogether abrogated, which contains a single invalid or ineffectual provision. (See the observations of Mr. J. Bronson on this subject, 18 Wend. 287, 288.)

To whatever extent our courts, in one or two instances, have gone in setting aside wills on account of some illegal provisions,

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yet they certainly have never approached the extreme point to which this court is urged to go in this case, and it is equally certain, that, in the latest and consequently the best considered and most authoritative cases, they have manifested a disposition not to carry the principle of the general invalidity of the will any further.

The settled doctrine on the subject is declared by Chancellor Walworth in the following explicit language.

"It is also a well settled principle of law, that when a will contains distinct and independent provisions, devising different portions of the testator's property, or distinct estates or interests in the same portions of the property, some of which provisions are consistent and others inconsistent, with the rules of the law, the former will be permitted to stand, although the latter are declared illegal and void, except when they are so dependent upon each other, that they cannot be separated." *Parks v. Parks*, (9 Paige, 117.) (See also 8 Paige, 128, 129 ; 9 Paige, 528, and the opinion of Mr. C. J. Nelson and Justices Bronson and Cowen, 18 Wend. 275, 285, 306 ; 20 Wend. 568, 569.)

This is explicit; and in this court at least, while it remains unreversed, must be deemed authoritative and conclusive.

And if it were necessary or proper to examine the grounds on which it rests, it would be found to be supported fully by the recent decisions in the Court of Errors.

If the rule thus laid down were open to exceptions, yet there are strong reasons for confining this case within the rule.

If the will should be set aside, an important and valid provision for Mr. George Jones would be abrogated, in opposition to the certain and undoubted intention of the testator, without any equivalent to Mr. Jones.

Can the court, or would the court do this?

It is *certain* that the testator intended to give to the persons named in the first five clauses of his will, one-half of his property. It is *certain* that he intended that his other children should not have the other half absolutely.

His intention in these two points is ascertained, positively and beyond a doubt.

What he would have done, if he had been informed that the

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trusts in his will were void, is not known, and never can be known!

There is *no ground* to presume that he would have given to each of his sons, and Mrs. Alston, respectively, an absolute legal estate in an eighth of all his property; especially if he had foreseen, that it was owing entirely to themselves, that the trust which he had established was disturbed.

To raise such presumption, not only without any evidence, but in opposition to so much evidence to the contrary, and, upon such a presumption, to defeat his certain, known, and lawful intentions, would be as alarming as it would be unreasonable and unjust.

V. It is an ancient and established maxim in the construction of all instruments, so to decide *ut res magis valeat quam pereat*. This rule has been universally commended for its wisdom, justice and benignity. Wills, especially, ought to receive such a construction, being often, and indeed generally, drawn in haste, by unpracticed and unskillful hands, and without opportunity for a careful selection of language, or a careful consideration of the effect of provisions inserted or omitted.

If wills are set aside or disturbed for light or doubtful reasons, litigation and family controversies are invited and promoted, and the salutary control over children, when they are young, improvident and exposed to temptation, which results from their dependence upon the parental bounty, will be weakened. Good morals, therefore, and principles of public policy afford additional considerations in favor of supporting wills, so far as they are not clearly invalid, and especially in those cases, where a party voluntarily questions the legality of a provision in his own favor, and makes that the ground of an attack upon other independent provisions, which in themselves are clearly legal and valid.

VI. Upon the whole, the more this will is examined and the more the principles of law as now settled are applied to it, the more clearly will the validity of all its provisions appear.

THE ASSISTANT VICE-CHANCELLOR.—The most formidable objection made to the validity of the devise in trust, is that it vests one-half of the estate in the trustees for the payment of an-

nuities to more than two persons for their lives, and that the power of alienation is thereby suspended for more than two lives in being at the creation of the estate.

It is insisted in behalf of James and Henry Mason, that the devise vests the whole of the half part of the estate, in the trustees, as an entirety, upon the whole of which the annuities are charged, and which cannot be relieved from that charge, until all those annuities are accomplished.

The trustees contend, on the other hand, that the testator intended to vest the trust fund in them, as four several and distinct equal eighth parts or shares of his estate; each eighth part being chargeable with one annuity and vesting absolutely on the cessation of such annuity; and that there is no charge upon either of those eighth parts, for any of the other annuities.

If the former be the true construction, the objection to the devise must be sustained; for there are four life annuities certain, created by the will, and three more which are contingent.

If the devises in trust are to be deemed separate and distinct as to each eighth part of the estate, independent of the others, the annuities do not suspend the alienation of such part beyond the time allowed by law. Because, assuming that the annuities are inalienable, as is claimed by the counsel for Henry Mason, there are only two successive annuities attached to either of the eighth parts separately considered; and upon the termination of the second annuity, at all events, the estate in such eighth part will vest absolutely in possession in those to whom the capital of that eighth part is given by the will. The estate in the eighth part of John Mason, Junior, will vest absolutely upon his death; and so the eighth parts of James and Henry, if they survive their respective wives, will vest in like manner upon their decease; and Mrs. Alston's eighth will vest in her lifetime, if she survives her husband.

In order the better to ascertain whether any portion of the trust estate must necessarily remain suspended during the continuance of more than two lives, I will collate the clauses in the will which are thought to bear upon the question.

The half part of the estate is given entire to the trustees, for the uses and purposes declared.

The trustees are to rent, invest and improve the same, and receive the income.

By and out of the income, or so much of it as may be necessary for that purpose, they are to pay the four prescribed annuities, to Mrs. Alston, John, James and Henry. Each annuity is to be paid in two equal instalments, semi-annually, and to continue during the respective lives of the four annuitants, except as to Mrs. Alston in the event of her surviving her husband.

If he survives her, the annuity of \$3000 is continued to him for life; and the annuities to James and Henry are continued in like manner to their respective widows, in case of their leaving their wives surviving.

The trustees are clothed with a discretionary power to increase the annuities to those three children respectively, but the power does not extend to the widows of the sons, or to the husband of Mrs. Alston.

Should the clear net income of the *trust fund*, that is, of the one-half part of the estate, exceed the annuities, the surplus in regard to three-fourth parts thereof, is directed to accumulate equally for the benefit of the children or other issue of Helen, James and Henry respectively, during their respective minorities, and to be paid to them respectively at twenty-one; the children &c. taking by representation, and not *per capita*.

While Helen, James and Henry are without issue living, the surplus of the income of their "*said trust shares*," after satisfying the annuities to them or to the surviving husband of Helen, and the surviving widows of James and Henry, is to be paid to the three elder daughters, and to George Jones, equally, and to their respective issue by representation.

Mrs. Alston, from the death of her husband, and her issue if any, while both are living, and the issue if any, of James and Henry, are to participate in the division of the last mentioned surplus income.

Upon the death of Henry and James without issue, the testator gives the "*two equal fourth parts*," of the half of his estate, (subject to the annuities to their widows,) to his other children (except John) and their issue. And if one of those sons dies without issue, "the one-fourth part" of the half of the estate is divid-

ble in the same manner, including in the distribution, the issue of the other son.

These provisions are brought in favor of the argument that the testator intended to keep the half part of his estate entire, as long as any of the annuitants survived.

There are other provisions interspersed with these, which tend to an opposite conclusion. Thus upon the death of Mr. Alston, leaving Helen surviving, her annuity ceases; and the testator thereupon gives to her and her heirs, executors, administrators and assigns for ever, *the one equal undivided fourth part* of the half part of the estate which was vested in the trustees.

If Mrs. Alston should die before her husband, the testator in that event, gave the last mentioned fourth part of the trust fund, subject to the annuity to Mr. Alston, to her issue absolutely.

The division of the half into lesser parts, for the active purposes of the trust, is recognized in the direction to accumulate the surplus income, for the benefit of the issue of Helen, James and Henry. The direction is limited to "*three equal fourth parts*" of the trust fund, and omits the surplus arising from the fourth part subsequently disposed of in connection with the annuity to John; but still the surplus upon this clause, is to be ascertained after deducting the *three annuities*. Then in the next paragraph of the will, where the testator disposes of the surplus accruing while the annuitants are without issue living, he speaks thus, "And with regard to the *said trust shares* of the said Helen Alston, James Mason and Henry Mason, so long as they may *severally* be without issue living," &c. He thus treats the *three equal fourth parts*, and the *trust shares*, of those three children, as synonymous terms.

Upon the decease of his son John, the testator gave "*the one equal fourth part*" of the half part of his property, *together with the surplus of the income thereof during his life after satisfying his annuity*, to the three elder daughters, to Mr. Jones, Mrs. Alston or her issue, and to the issue of the sons; in the same manner as I have described in reference to the surplus of income while the other three annuitants were childless.

The devise upon the death of James and Henry, is in these words:

"And upon the deaths of the said James Mason and Henry Mason *respectively*, I give, devise and bequeath *the two equal fourth parts* of the said remaining half part of my property and estate, both real and personal, *to their respective issue*, such issue taking share and share alike, by representation, and not *per capita*, subject to the said annuities to the widows of my last named two sons, should such widows survive them."

Following this, is the provision before stated, in the event of one or both of these two sons dying without issue; by which if one dies leaving no issue, the one-fourth part of the half of the estate is given over to the other branches of the family, including the issue of the other son.

It is undoubtedly true, that the circumstance of the four equal eighth parts being given to the trustees by the description of "*the remaining equal undivided half part*" of all the estate, is comparatively unimportant in determining the nature and extent of the interests in the various portions which make up that half of the estate. And I am not disposed to attach much weight to the argument arising from the joint bequest, and the union of the words in which it is made, except in connection with some union of the things given thereby. A different rule as to the effect of such general words, would drive testators to intolerable prolixity in wills, so that where provisions were to be made for eight children by a trust for each, there would needs be a separate bequest of each eighth part in turn, with a repetition as to each of all the trust clauses and powers, and the disposal of the fund.

The import of the general words used, must be ascertained upon a view of the whole will, and of the effect of the various dispositions sought to be made by the testator.

I should have no difficulty in holding that this devise was several and distinct, as to each eighth part constituting the half given in trust, if the disposition of the whole property had been equal, to and among the eight children and their respective descendants. I mean, equal independent of the difference made in giving the four eighth parts first mentioned in the will, absolutely, and in bestowing only partial life interests in the income, upon John, James, Henry and Mrs. Alston. The latter discrepancy

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would have had no influence, if Henry and his issue, for instance, were unitedly to receive as much of the estate as Mrs. Hamersley and each of her elder sisters.

But the testator has departed essentially from an equal division of his property amongst the several branches of his family.

To his daughters Mary, Rebecca, and Sarah, and to the children of his daughter Serena, (to the latter together and in connection with the life estate of their father,) he gave in the first instance, each an equal eighth part of his estate. Mrs. Alston and her family, provided she had children living at the death of the testator and they survived her, (but not otherwise,) would receive another equal eighth part. While the three sons of the testator were restricted to the annuities for their lives, and the whole surplus of income arising from two-eighths of the estate as long as they remained childless, would be divided amongst the five first named branches of the family; and as to the other eighth part, the surplus would in no event enure to the benefit of the annuitant. To illustrate this inequality, let me take the facts as they were at the death of the testator, estimating the assets from the uncontradicted statement in the bill.

James and Henry Mason then had no children; Mrs. Alston had one child living. The income of the estate, I will assume at \$40,000. At the outset, the daughters Mary, Rebecca and Sarah, and the son in law George Jones, would receive each \$5000 a year in respect of the absolute gifts to them. Mrs. Alston would take her annuity of \$3000; and a further sum of \$2000 a year would be put to accumulate for her child. James and Henry would receive their annuities of \$2500 each, and John his annuity of \$2000.

The remaining \$8000 of the income of the estate, would be divided equally between Mary, Rebecca, Sarah, George Jones, and the child of Mrs. Alston.

Thus the three daughters first named would each take \$6600 annually, and Mr. George Jones the same. Mrs. Alston would receive \$3000, her child \$1600, and \$2000 more be accumulated for the latter. While James and Henry would take \$2500 each, and John \$2000. In other words, the five daughters and their

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families would receive \$33,000 a year, in the aggregate ; and the three sons an aggregate of \$7000 a year.

This inequality would continue, so long as the sons remained without issue. On the birth of issue to either Henry or James, such issue while living, would participate in the benefit of the surplus in the same manner as the child of Helen Alston, and as to the family of such son, the inequality would cease. It would nevertheless continue in reference to the sons who remained without living issue, though with a disproportion somewhat lessened.

I do not refer in this place to the discretion vested in the executors for the increase of the annuities, nor to their subsequent liberal exercise of that discretion to the full extent of giving to James, Henry and Mrs. Alston the entire income of the respective eighth parts of the estate. The construction of the will is to be deduced from what might have occurred under its provisions, not what has been done. The executors might have left the annuities where the testator placed them, and the grant of the discretion therefore does not alter the effect of the will in reference to the point in question.

There is also an inequality in the provisions made for the four children who are the annuitants by the will, which is embarrassing in distributing the trust half of the estate into four equal parts and considering each part as separately devised in trust.

The annuities are unequal, and the child of Mrs. Alston living at the testator's death, partook with the families of the other daughters, in the surplus income from two eighths of the estate to the exclusion of Henry and James and their future issue ; and the same child became beneficially entitled to the surplus from another eighth part of the estate, by way of accumulation.

I am now assuming that the trust for accumulation is unobjectionable, and treating the annuities as they are given by the will.

The birth and continuance of issue of James and Henry, will not remove this inequality between them and Mrs. Alston. She will still receive \$500 a year more than either of her brothers ; and her issue will be on an equal footing with theirs in respect

of the surplus from the three fourth parts of the trust fund, if that clause of the will is to have a literal construction.

The inequality between John and the others provided for in the trust, is not only greater than that of the other sons, but is to continue during his life.

These brief illustrations of the effect of the will, demonstrate that it does not distribute the estate into equal eighth parts, of which one entire part is designed for the exclusive benefit of each of the eight branches of the testator's family.

This equal distribution is true of the half part which is given absolutely to the four branches which are first named in the will; but it is wholly untrue in regard to the four remaining branches of the family.

The testator does not contemplate in his will, any deficiency in the four annuities. From the magnitude of the estate, no deficiency is probable; but there are many contingencies of a kind which often occur, that may bring it about.

Let us suppose that the trust fund or half of the estate, should a year hence, produce an income of only \$8000, and that Henry and his wife should then be dead, leaving issue.

Under the clause of the will giving the annuities, Mrs. Alston would in that case be entitled to \$2400 for her annuity, James to \$2000, and John to \$1600.

Now if the trust fund be devised in separate eighth parts, the eighth part designed for Mrs. Alston and her family would in this event pay only \$2000 for her annuity; because on this construction, the eighth part held in trust for each of the four branches of the testator's family, would become divisible and vest in the issue of each branch on the death of their parents, and Henry's fourth part would have been withdrawn from the trust. So if Mrs. Alston should survive both of her brothers and their wives, and the income of one-eighth of the estate in a given year, should be only \$2000. Is she to accept that sum in full for her annuity, or is she to receive \$2400 which would be her proportion of the \$8000 income arising from half of the estate?

This cannot be answered by saying that she must make up her due proportion as well as all arrears, out of the income during those years when there is a surplus. There may be no such

fruitful years, and the annuity *must come out of the income*. Besides, this is a question of strict right on her part, and she may justly insist, (upon the construction that the devise is entire,) that any surplus of income in other years shall enure to the benefit of her children as provided in the will.

In the will of Clendining, which was cited as a direct authority in favor of the position that the devise was to be construed as a separate trust in respect of each of the equal eighth parts of the property; there was no such inequality as exists in this case. (*De Peyster v. Clendining*, 8 Paige, 295. C. S. on appeal, 26 Wend. 21.) Although two of the children were to receive under that will, twice as much as either of the three others, yet the capital was distributable to their respective issue in the same relative proportions. It was therefore in effect, a bequest of two-sevenths of the residuary estate to trustees, in trust to pay Letitia the income during her life, and to pay the principal fund to her issue at her death; a like bequest of one-seventh for John Clendining and his issue; and so on of the shares of the other children. Thus there was no difficulty in construing the joint bequest of the whole property in trust, as separate bequests of the respective shares intended for each of the children and their respective issue. And the Chancellor held that the testator intended to suspend the absolute ownership in each share, no longer than the joint lives of his widow and the child entitled to the life interest in such share.

There is a direction for distribution in the will of Mr. Mason, on the death of each set of annuitants, and it remains to be seen whether upon the true construction of the will this direction must prevail under every contingency, and without regard to the annuities which may then be continuing and payable to the other annuitants. If such a construction can be maintained, the devise in question is relieved from the objection with which I set out. It then becomes what the defendants claim it to be, a devise in trust of four distinct and separate eighth parts, one of which is subject to the charge of an annuity of \$3000, one to a like charge of \$2000, and the others are subject to a like charge of \$2500 each.

Now although the trust fund is created as being one-half of the estate, and given to the trustees as such, with a single and entire direction to rent and invest it, and receive and pay out the income of such half part, and not of any one-eighth part or any less than such half; yet it is perfectly plain that there is one quarter of the trust estate which is not subject to any charge that bears upon the other three quarters of the trust, and which is to be distributed upon the termination of a single life. This is the one quarter of the fund which is designed for John Mason, Junior.

The provision in the will is explicit, that the whole surplus income of this quarter, after paying the annuity of \$2000, is to be divided at his death. This prevents it from being affected, under any circumstances, by the larger annuity given to the Alston's; so that if in any year the net income of the half of the estate should be only \$8000, there would be no abatement in John's annuity. The other three annuities must be paid out of the \$6000 arising from the three remaining fourths of the trust estate.

Equally positive and explicit is the direction in the will, that upon the death of John, this one-fourth part is to go directly, and absolutely, without any charge upon it, or any reservation of time or circumstance, to the devisees of the same in remainder.

The detaching of the one-fourth part from the operation of the general and joint expressions used by the testator respecting the whole trust fund, essentially weakens, if it does not entirely overthrow, the argument founded upon those expressions in reference to the other three fourth parts.

Now to recur to the difficulty which arises from the inequality of the bequest carved out of the half part put in trust.

There is a positive direction to the trustees, to pay out of the income of this half part, an annuity of \$3000 a year to Mrs. Alston for her life, and to her husband for his life after her death. How can this be accomplished if the half of the estate should produce only \$10,000 of income, and on the death of James or Henry, one-fourth of the half is withdrawn from the trust? We have seen that John's one-fourth is not to be touched to eke out the annuities of the others. And \$5000 of income will not pay two annuities amounting to \$5500.

Yet the provision is equally positive, that on the death of

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either James or Henry, the equal fourth part of the trust fund, is to go directly to their respective issue, vesting absolutely, and subject only to the annuity to the surviving widow of the deceased. This is the clear effect of the devise, although the language speaks of the death of James *and* Henry, and the gift is of the *two equal fourth parts*. The language is distributive, as shown by the words *respectively*, and *respective issue*; and the next paragraph, which is a part of the same particular devise, speaks of the death of the sons *or either of them*. If either James or Henry die without issue, this paragraph creates a direct gift of the one-fourth part, to the other children of the testator and their issue, vesting absolutely in the persons and classes entitled by the terms of the gift, subject only to the widow's annuity, if there be a widow surviving.

Another provision of the will which at first blush, conflicts with a separation of the trust into four distinct parts, is the one which gives a discretion to the trustees to increase the respective annuities. This opens the way for a much greater inequality between Mrs. Alston and her brothers, than that to which I have referred. And if this discretion were to be extended over the three fourth parts of the trust, it might interfere conclusively with any distribution till the end of three lives at least.

For example, I will assume that the income from the three fourths is at this time, \$15,000.

In their enlarged discretion, the trustees may determine that Mrs. Alston ought to receive eight, nine, or ten thousand dollars a year, out of this income.

Unless the trust as to the three fourths is to remain entire, notwithstanding the death of Henry or James, or of both; this discretionary enlargement would be cut off by such an event, contrary to the apparent intent of the testator as derived from this clause of the will.

Of course the same argument holds good, in reference to a supposed increase of the annuity to Henry, or to James, beyond one fourth of the income.

Moreover the intent is very clearly expressed, that the discretion may be exercised at any period during the life of Henry, James, and Mrs. Alston respectively; and there is no design in

express terms, that it shall be restricted in its extent, when exerted in behalf of either, to the one-fourth of the income of the trust estate.

Whether the trustees may enlarge either annuity more than once, or cut it down again, after once increasing it, I am not required to express an opinion.

The next clause in the will, which is the one for accumulation, when taken by itself, presents another obstacle to the severance of the three fourth parts of the trust, which constitute its subject matter; because it makes a joint charge of the three annuities on the income of those three fourth parts. It does not direct the surplus income of the *several fourth parts*, to be accumulated, nor can it be so construed upon the literal terms of the paragraph. The three annuities, Mrs. Alston's being \$500 more than either of the others, are to be paid first out of the three-fourths of the income of the trust fund, and the residue of the income is to be divided equally.

Therefore regarding them for the moment, as three distinct shares, there is \$2500 payable out of each share, and then \$500 more which is to be paid to Mrs. Alston by the three shares equally, one-third by each. Whether the income of the three fourths be \$10,000 or \$15,000, the result would be the same, because the surplus for accumulation is to be ascertained by first paying the three annuities, although they are unequal, and then such surplus is to be equally divided. This result would necessarily require the three fourth parts to be kept together so long as Mrs. Alston and her husband both lived, because her annuity, being more than the other two, would during all that time be a charge for the excess at least, upon the whole three fourths of the fund. And as she and her husband might outlive both James and Henry, if this clause of the will must receive a literal construction, it may suspend the power of aliening the three fourth parts for at least three lives in being at the creation of the estate.

If the annuities were increased pursuant to the discretion conferred upon the executors, the same difficulty would occur, if they continued to be unequal; and as the discretion extends to

increasing one and not the others, we are to regard it as if they had so exercised the power.

Thus the expression "the three equal fourth parts thereof," in the paragraph in question, does not aid the construction claimed that the devise in trust is wholly distributive.

To proceed one step farther, to the paragraph connected with the one last treated, and providing for the event that the three annuitants are without issue to take the benefit of the accumulation directed in the latter.

By this clause of the will, if either of the three are without issue, the surplus of the income of those respective trust shares, is to be divided among the other children. The language is, "with regard to *the said trust shares of the said Helen Alston, James Mason and Henry Mason*, so long as they may *severally* be without issue living, the surplus of the *income thereof*," &c., "after satisfying the said annuities to them, or to the surviving husband of the said Helen Alston, and the surviving widows of the said James Mason and Henry Mason, shall be paid," &c.

Here the three fourth parts are clearly treated as several, in respect of the three annuitants. Indeed they are spoken of as belonging to the annuitants; the *trust shares of Mrs. Alston, &c.* Then the surplus income is to be ascertained in the same manner after the second class of annuitants become entitled, as while Mrs. Alston and the sons are living. The annuities are to be satisfied first, in each case, and the surplus distributed.

Now the will is plain, that after the death of Mrs. Alston, her annuity, if her husband survives to take it, is to be a charge upon the one-fourth part of the trust fund by itself. It is precisely the same, in regard to the annuities continuing to the widows of James and Henry. Each is a charge upon a separate fourth part.

This being so, is it not a consequence, that the same mode of ascertaining the surplus for division under this paragraph of the will, is to be used from the outset? That the surplus income is the income of one-fourth of the trust, after satisfying the annuity of the person whose childless state occasions its distribution.

This appears to me to be the true construction. Nay, more,

that it is the necessary construction. Let us apply the paragraph as the executors were bound to apply it at the end of a month from the death of the testator. Mrs. Alston then had issue; James and Henry had none.

The child of Mrs. Alston was entitled to the accumulation given by the previous clause; while under this provision, there was to be a distribution in respect of James and Henry. Taking the two clauses together, the infant Alston could claim no accumulation from the income of the trust shares of James and Henry. The latter clause precludes such a claim. Nor could Mrs. Alston's annuity of \$3000 be extended over those shares of James and Henry for the excess of \$500 so as to swell her child's accumulation; because in the case as it stood at the testator's death, the surplus income of those two shares was to be ascertained by satisfying their two annuities, and nothing more. Therefore Mrs. Alston's annuity of \$3000 would of necessity be paid out of her share, or one-fourth of the trust estate; and the surplus income of the same one-fourth, and no more nor less, would be put to accumulate for her child.

This demonstrates that the two paragraphs which I have been considering, when taken together, do not sustain the position of a joint charge of the three annuities upon the three fourths of the trust fund, but are strongly in favor of the contrary construction. The last paragraph is entirely inconsistent with any such joint devise and charge of the three fourths.

There are other provisions of a prominent character in the will, among those that I have before briefly collated, which lead to the conclusion that the devises are of separate fourth parts of the trust fund.

In the event of Mrs. Alston's surviving her husband, her annuity ceases, and one-fourth part of this fund, comes into her possession absolutely, in her own right. This is an explicit direction, which is wholly independent of the remainder of the trust fund, and it is to take effect without any regard to the continuance or termination of the various other limitations of or in such remainder.

So if her husband shall survive her, the same fourth part will

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then vest absolutely in her children or issue, subject to the annuity of \$3000 which is continued to him.

Here again are directions equally as positive as those in regard to the share of John Mason, Junior; and on giving them full effect, they detach another fourth part from any necessary connection with the other portions of the trust fund.

Nor is this their only influence and bearing upon the question, for as I have before observed, they in the one event extinguish the largest annuity given by the will and in the other fasten it upon the same one-fourth part of the fund, exclusive of all the other shares.

The latter result, which ensues upon Mrs. Alston's dying before her husband, is a strong argument to show that the testator never intended to make her annuity, under any circumstances, a burthen upon any or either of the other three-fourths of the trust estate.

This argument is to my mind strengthened by another consideration arising from the amount of the property. It is apparent upon the will itself, that the testator expected the trust would produce a considerable surplus income beyond the \$10,000 required for the annuities. And we have besides the extrinsic fact, (to which resort may be had in aid of the construction upon a point like this,) that the income of one quarter of the trust fund, after his death, was nearly double the largest annuity. The testator could not have supposed that the annuity which he specified for Mrs. Alston, or any reasonable increase of its amount by the executors, would ever require for its support more than one-eighth of his estate.

To recapitulate in brief terms.

The devise is in its scope, joint and entire; the direction to rent, improve or collect is also entire; and the annuities are to be paid out of the entire income; yet there is one-fourth part of the fund, the share of John Mason, Junior, which is in no wise connected with the other portions of it, the income of which fourth must be kept distinct, and the capital and surplus income vested and divided upon his death.

This effectually breaks the charm of the unity and entirety of the trust devise.

The fourth part destined for Mrs. Alston and her issue, must vest absolutely in her, on her husband's death; or if she die first, it then vests in her issue, and is totally detached from the residue.

The will is equally explicit that the several fourth parts designed for the issue of Henry and James, shall vest absolutely, upon their respective deaths.

The direction in the will for dividing the surplus income, while either of those two sons is childless, cannot be carried into effect upon any other basis than a separation of the trust into four distinct devises of as many equal parts.

And the only part of the will that is adverse to this conclusion is the direction to pay unequal annuities, which by means of a deficiency of income, or an increase of their amount in unequal proportions by the executors, may if it is to be literally executed, require a joint charge on three-fourths of the fund, to carry out their full payment.

The testator did not have in view the existence of any state of things which would make the joint charge *necessary*, in order to pay the annuities.

And his clear paramount intent in respect of the distribution of the surplus income, and the vesting of the capital of one-fourth absolutely, on the death of each of the four children who were annuitants, conflicts with any joint charge upon any two or more of such fourth parts.

He left his estate in such a condition that his will can be fully carried out by considering the devise in question to be of four separate and distinct parts. If by any unforeseen occurrence, there should be a collision between the provision for Mrs. Alston's annuity, and other portions of the will, the former being in conflict with the principal scope and intent of the testator as deduced from the whole instrument, must give way to such general purposes.

My conclusion is that it was not the intent of the testator, nor the effect of the language used in the will, when considered as a whole; to create a trust by which one-half of his estate was to re-

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main entire in the hands of the trustees until after the determination of the annuities granted to his children.

On the contrary, that his intent and the effect of the devise made, was to vest the fund in the trustees in four distinct and equal shares; each of which was chargeable with a single annuity, and vested on the death of the child to whom such annuity was payable. If Mrs. Alston survived her husband, her fourth part was to vest in her in possession. If Henry and James died after their wives, their respective fourth parts would be divisible upon their deaths.

And in no event would either share, or any part of either, remain suspended, so as not to be alienable, beyond two lives in being.

In order to give due effect to the other parts of the will, the discretion of the trustees to increase the annuities, must be restricted within the bounds of the income of the respective fourth parts of the trust fund.

SECOND. The next objection to the validity of the will, is that the trust for accumulation of three-fourths of the one-half of the estate for the benefit of unborn children is illegal, because the persons are not named during whose minority the accumulation is to commence, and at the expiration of which it is to terminate; and because its commencement is postponed too long.

The trust does not commence until a month after the death of the testator, and therefore it does not fall within the first subdivision of the respective sections relative to accumulations of real and personal estate. (1 R. S. 726, § 37, *ibid.* 773, § 3.)

Considered with reference to the second subdivisions of those sections, it commences within the time prescribed; for as to each fourth part, it must commence, if ever, within the lives of the two annuitants who successively receive their annuity from such fourth part. It must necessarily commence during the minority of those for whom it is provided, because they must be in life before there is to be any accumulation, and it terminates on their becoming of full age. The question is, whether all the persons for whom it is intended, must be living at its commencement. As to their being named, I think the designation of a

class of persons is within the statute, and that it requires no other description.

The direction in this will is to accumulate for the benefit of *the children or other issue* of the respective sons and the daughter. The word *equally* refers to the fourth parts, not to the children or issue.

Thus in Mrs. Alston's case, at the outset of the accumulation, it would be for the benefit wholly of her child then living. On the birth of another child, it would be from thence for the benefit of both children, and so on upon an increase in their number. Then when the eldest became of full age, he would receive all that had accumulated for him, and cease to participate for the future.

It occurred to me at first, that this construction would interfere with the spirit of the statute, by permitting a succession of accumulations, and extending the time in which they would progress. I do not perceive that the mere succession of them is objectionable, if they all fall within the prescribed limit as to time, so as not to suspend unduly the absolute ownership or power of alienation.

In this case the time falls far short of what the statute permits, because the accumulation is not only to commence within two lives in being, but it is to terminate with those lives. The respective trust funds vest absolutely and become divisible, and the entire trusts cease, with those two lives. In Mrs. Alston's share they will cease on the death of her husband, which may occur while she lives, and thus the suspension continue for one life only. But I will proceed to view it as a general proposition, applicable to all cases arising under the second subdivision of the sections in question.

The accumulation may be postponed in its inception to any point of time within the compass of two lives in being, and then may continue till the end of the minority of the beneficiary. Suppose in this instance, the direction had been for an accumulation during the minority of the youngest child of Mrs. Alston, to commence at its birth, and to be for the benefit of all her minor children or issue then living, so long as they continued under age. It may be said that this would be void for the uncertainty

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of the time of its commencement. To this I might answer, it could be made certain by relation, for if she had one child, there would infallibly be a youngest child. There might, I admit, be a difficulty in going back to begin the accumulation after the youngest child was ascertained by events subsequent to its birth. I put the case however, merely to illustrate the question of time; and a direction to begin an accumulation twenty years after the testator's death, if A. and B. so long lived, would illustrate it equally as well. And I think either hypothesis shows that a trust of this kind may be made quite as enduring, where there is to be no succession of parties entitled, as where it is to commence with the birth of children and to embrace all the afterborn children of the *cestui que vie*.

There is a difference in this, that in the cases supposed, the accumulation itself will continue for a less period, and the intermediate rents or income will vest in other parties; but the ownership of the estate will be suspended in each instance, to the end of the accumulation.

It appears by the revisers notes accompanying the introduction of these provisions to the legislature, that they intended to allow of accumulations for the benefit of infants entitled to the next eventual estate. (3 Rev. Stat. 578, 2d ed.)

This object, and nothing more is attained by the devise in Mr. Mason's will, and there is the further merit in the provision, that it makes the distribution of the benefit of the surplus income of each of the three-fourth parts among the issue of the respective annuitants, as nearly equal as is consistent with a valid bequest under the statute.

I feel much diffidence in the disposal of the point, but my conviction is clear, that the trusts for accumulation are valid.

THIRD. It is objected that the power of alienation is suspended for one month from the testator's death, and the devise is therefore void.

This would undoubtedly be the consequence, if there were an absolute suspension for a month, without reference to lives in being. But there is no such suspension here. The accumulation is not to commence till after a month; but if Mr. and Mrs. Alston, for instance, (or Mr. Alston alone,) had died within the

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month, the accumulation would never have commenced at all as to that fourth part. So if James Mason and his wife had died the next day after the testator, another one-fourth would at that instant have vested absolutely in possession. The duration of the trust as to each fourth part of the fund is dependent entirely upon the continuance of lives, and not upon any fixed period of time.

FOURTH. It is also made an objection to the devise, that a trust for the payment of annuities, is not authorized by section 55 of the revised statutes relative to uses and trusts.

The point has been held otherwise in several cases. (See *Hawley v. James*, 16 Wend. 61, per Nelson, Ch. J., and Maeson, Senator; and in the same case, per the Chancellor, 5 Paige, 321; *De Peyster v. Clendining*, 8 Paige, 295; *S. C. nomine Bulkley v. De Peyster*, 26 Wend. 21.)

FIFTH. As to the objections to the direction for distributing the surplus income, while the three principal annuitants are without issue.

There is no uncertainty, in my view of it, either as to what is to be divided, who is to receive it, or on what contingency it is divisible. I refer to what I have said in discussing the principal point in controversy.

In regard to George Jones, who in this instance is a beneficiary of the trust, the only consequence is that he takes a legal and not an equitable estate, in his proportion of the surplus to be distributed. (*Murray v. Murray*, before the Chancellor, decided April 19, 1842.)

SIXTH. The devise of John Mason, Junior's share after his death, is said to be both uncertain and incomprehensible.

There is evidently some omission of words, and perhaps a transposition of other words in this clause of the will; but having regard to the objects of the testator and the subject matter, it is perfectly intelligible.

SEVENTH. It was also made a point, that the complainant, in case the trusts of the will were adjudged to be valid, is entitled to a decree for the permanent continuance of the annuity to him, as enlarged by the trustees.

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As to this, there is no foundation laid for it in the bill. The court therefore has nothing to do with it in this suit.

The bill must be dismissed, with costs to the infant defendants, and to such of the other defendants as opposed the claims made by the complainant.

BLYER v. MONHOLLAND and others.

Where one purchases land which is subject to a bond and mortgage executed by his grantor, and in his deed assumes and agrees to pay the mortgage; he is liable to his grantor to pay the same as a part of the price or consideration of the land. As between him and the mortgagor, the latter thereupon becomes a surety for the former, in respect of the mortgage debt.

The obligation of the purchaser to pay the debt, enures in equity to the benefit of the mortgagee; and he may enforce it against the purchaser, to the extent of the deficiency, in a bill to foreclose his mortgage.

March 8, 10; April 5, 1845.

ON the 23d of November, 1835, Samuel Fitz Randolph being indebted to the complainant by his bond of \$2500, executed to the latter a mortgage on a lot in the city of New York, to secure its payment.

On the 1st of February, 1839, Fitz Randolph sold the lot to the defendant, Monholland, for \$2800, and conveyed the same to him by a deed of that date. The deed was delivered to and accepted by Monholland, and contained the following clause: "Subject however to a mortgage made to the said John Blyer, by the said Samuel and Huldah his wife, for twenty-five hundred dollars, (\$2500) dated the twenty-third day of November, 1835, and recorded in the office of register of the city and county of New York, in liber 195 of mortgages, page 259, as by reference thereto will more fully appear; (which the said party of the second part hereby assumes and agrees to pay.)"

Monholland paid the balance of the consideration, \$300, to Fitz Randolph at the execution of the deed. He went into the

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immediate possession of the lot, and paid interest to the complainant on his mortgage for several years.

In a bill to foreclose the mortgage, filed in 1844, these facts were stated, and the complainant claimed to make Monholland liable for any deficiency there might be in the collection of the mortgage debt. The latter put in an answer, stating that he bought only the equity of redemption in the lot, subject to the mortgage, and that he was not liable to pay any of the debt. He also set up the statute of frauds as a bar to any supposed liability by reason of his assumption of the mortgage.

He introduced some testimony in support of his allegation as to the purchase, which is alluded to in the opinion. The cause was heard on the pleadings and proofs.

D. P. Hall, for the complainant.

J. T. Brady, for the defendant Monholland.

THE ASSISTANT VICE-CHANCELLOR.—It is sufficiently established by the testimony, that the deed from Fitz Randolph to Monholland, expressed their agreement in relation to the mortgage in question.

The deed comes from the possession of the grantee, containing the assumption of the mortgage. This throws upon him the burthen of proving that the clause was interpolated, and that he did not in fact agree to pay the mortgage.

Some testimony has been taken on this point, and it establishes rather than overthrows, the effect of the deed. Fitz Randolph says that he sold the lot to Monholland for \$2800; and that the latter paid him \$300 of the price, and agreed to see the mortgage of \$2500 paid. The deed corresponds precisely with this agreement; and if it were true that Monholland heard the deed read before the assumption was inserted, and never heard it read afterwards, it would not do away with the fact that such an agreement was made. But there is no proof that he knew any thing about the contents of the deed before it was delivered to him duly executed, and with the clause inserted. Nor is there proof that he did not at the time of the delivery of the deed, know its con-

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tents fully. The law implies such knowledge from his acceptance of the instrument and acting under it. The fact that his daughter who is his principal clerk, never read this portion of it to him, is not sufficient evidence to rebut that legal presumption.

The complainant's mortgage was a part of the consideration which Monholland agreed with Fitz Randolph, to pay for the land. It was a part of the price; and the latter being indebted in that amount to the complainant, and the debt being a lien, Monholland agreed with Fitz Randolph to pay such amount to the complainant. It was therefore a debt due from M. to Fitz Randolph, payable by the arrangement between them, to the complainant.

It was a simple contract debt, for lands sold and conveyed by the one to the other. The effect of this arrangement in equity, as between them, was to make Fitz Randolph the surety of Monholland, in respect of the debt due to the complainant.

As between them and the complainant, it is immaterial whether he was to regard the relationship of principal and surety between them. It sufficed for him that he held this mortgage debt against Fitz Randolph, and that the latter had obtained the obligation of Monholland to himself, to discharge that debt. This obligation enured in equity to the benefit of the complainant. The case of *Curtis v. Tyler and Allen*, (9 Paige's R. 432,) is directly in point.

The obligation is not enforced, as being made by Monholland to the complainant, for the payment of Fitz Randolph's debt; but as a promise by M. to Fitz Randolph to pay to him \$2500, by paying that sum to the complainant in discharge of his debt; which promise the complainant, as the mortgage creditor of Fitz Randolph, is equitably entitled to lay hold of and enforce, under the equity of the provision in the revised statutes relative to the foreclosure of mortgages in chancery. (2 R. S. 191, § 154.)

The counsel for the defendant, in an able and ingenious argument, contended that the promise of Monholland was to answer for the debt of another, and the deed not being signed by him, the promise was void by the statute of frauds. In my view of the case, the point is inapplicable.

The complainant is entitled to a decree for the foreclosure and

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sale of the lot mortgaged, and that Monholland pay the deficiency of his debt and costs.

H. and R. YELVERTON v. SHELDEN and others.

S. a simple contract creditor of M. arranged with M. and a surety of M. on sundry debts, to whom M. had given a mortgage as security, that M. should discharge part of the mortgagee's liabilities and S. the residue, upon which the mortgage was to be assigned to S.; and the arrangement was consummated. *Held*, that S. could not enforce the mortgage for any more than he advanced, against a judgment docketed against M. before the assignment.

In respect of the judgment, the mortgage was discharged to the extent of the liabilities of the mortgagee which were paid by M.

Another debt could not be substituted and secured by the mortgage, in lieu of the extinguished liabilities so as to give it priority over the judgment.

S. having given up to M. his note on receiving the assignment, expecting to collect his debt upon the mortgage; it was held that M. was a necessary party in a suit by the judgment creditor to redeem the mortgage.

It was also held that the mortgagee was not a necessary party to such suit.

An assignment to two persons to secure their liabilities for the assignor, does not secure their several liabilities.

March 5; April 24, 1845.

THE complainants, on the 25th of April, 1843, recovered a judgment against Henry Miner, which was docketed and became a lien on his real estate in the county of Lewis. On the 7th of September following, they became the purchasers of the land on an execution issued upon their judgment and received a certificate from the sheriff.

The lands were subject to a mortgage executed by Miner to N. Gowdy, for \$1100, dated April 30, 1842, which was in fact given to secure his indorsements for and claims against Miner. When the complainants recovered their judgment, Gowdy was Miner's indorser on two notes, one for \$700 and interest to Peter Sterling, and the other for \$175 and interest to Wilson, Mills & Co., and he had Miner's note for \$16.

In August, 1843, H. Sheldon & Co., merchants in New York, having a note against Miner for about \$406, sent it to Lewis county for collection. A negotiation ensued which resulted in an agreement, whereby on Sheldon & Co. advancing to Gowdy the

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amount of the Sterling note, Miner was to procure him to be discharged from the other two notes on which he was liable, and was to secure \$300 of Sheldon & Co.'s debt and costs, and Gowdy was thereupon to assign his mortgage to the latter. All this was done; and Miner's note to Sheldon & Co. was considered as cancelled.

The note to Wilson, Mills & Co. was taken up and Gowdy discharged, by a new note of Miner's with other security.

At the time of the execution of the mortgage, Miner assigned all his personal property to Gowdy and one Harger, as security for their liabilities in his behalf. Certain notes, the proceeds of this assignment, were transferred to Sheldon & Co. with the mortgage, as further security.

The complainants, tendered to Sheldon & Co. the sum paid by them to Gowdy with interest, (less about \$200 which they alleged had been collected on the notes last mentioned;) and required an assignment of the mortgage. Sheldon & Co. refused to receive the amount offered, and insisted that they were entitled to the mortgage for their whole debt against Miner, in addition to the sum which they advanced to Gowdy. The complainants thereupon filed the bill in this cause against Sheldon & Co., to obtain a redemption of the lands mortgaged. In their answer the defendants insisted that Miner and Gowdy ought to be made parties to the suit. The cause was heard on the pleadings and proofs.

J. H. Magher, for the complainants.

G. Bowman, for the defendant.

THE ASSISTANT VICE-CHANCELLOR.—The complainants by their purchase at the sheriff's sale, became vested with all the title which Miner had to the mortgaged premises on the day the judgment was docketed, unaffected by any subsequent acts or agreements of either Miner or Gowdy. (*Kellogg v. Wood*, 4 Paige, 578; and see *Brinckerhoff v. Marvin*, 5 J. C. R. 326.)

When the defendants took the assignment of Gowdy's mortgage, it is not pretended that there were more than three claims

which Gowdy could enforce by virtue of the mortgage, as against the complainants judgment. Those were, the liability of \$700 to Sterling; the liability to Wilson, Mills & Co., amounting to about \$175; and the small debt of \$16.

The defendants had a debt against Miner of nearly a year's standing, which was in suit, and which they were anxious to secure.

According to their own account of the transaction as given in their answer, Miner proposed to them that if they would advance the Sterling debt to Gowdy, he, Miner, would satisfy to Gowdy the balance of the mortgage, procure it to be assigned to them, and give to them security for their costs and for \$300 of their debt. The defendants agreed to this proposition, and it was carried out.

They paid the amount of the Sterling debt to Gowdy. Miner paid or satisfied to Gowdy, the Wilson, Mills & Co. debt, and the note of \$16. He gave to the defendants the stipulated security for the \$300 and the costs; and Gowdy assigned to them Miner's mortgage. I have no doubt but that they supposed they could enforce this mortgage for the whole amount for which Gowdy held it, previous to their arrangement with Miner. But this was entirely a mistake.

The mortgage in their hands was valid for all for which Gowdy held it, at the moment he assigned it, and for nothing more. Before he assigned the security, he took care to see that Miner discharged the Wilson debt, and satisfied him for the note; and on assigning it, he received the Sterling debt.

The smaller debts were thus extinguished, before the mortgage was assigned to the defendants. They were satisfied by the debtor himself, and not by any money, property or other valuable consideration proceeding from the defendants.

This distinguishes the transaction from the cases cited by the defendant's counsel, where in substance, the party taking the assignment or becoming entitled to it, paid the money or property to the holder of the security or for his benefit. In this case, it was an attempt to substitute a part of the defendant's debt, for that of Gowdy, and thus to give it a priority over the complainant's judgment.

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The mode pursued, was precisely the same in legal effect, as if the mortgage had been conditioned to pay to Gowdy \$891, and Miner had paid to him \$191, the defendants had paid the residue, and Gowdy had thereupon assigned the mortgage to the defendants.

It is perfectly clear that they can enforce the mortgage for no more than the \$700 and interest paid by them to Gowdy.

The complainants offered to pay this amount to the defendants, in order to redeem the mortgage. But they insist farther, that Gowdy had in his hands as security for the same liabilities, certain notes which also came to the possession of the defendants; and that Gowdy was bound to use these notes in exoneration of his prior lien on the land, that being the only fund out of which the complainants could collect their debt.

Upon this point, I think the complainants are wrong.

The assignment of the notes of Miner was made to Gowdy and N. N. Harger jointly. It recites joint liabilities only, and it is those alone which the assignees were authorized to discharge from its proceeds.

The complainants appear to be entitled to a decree for redemption, on the merits of the controversy.

There is an objection for want of parties which remains to be considered.

I do not think that Gowdy is a necessary party to the suit. The defendants do not pretend that he was guilty of any fraud, deception or concealment, in making the assignment. The affair was not one of his seeking. On being discharged from his liabilities, he assigned the mortgage. The assignees or their agent, were cognizant of all the facts, and took such title as his transfer would give to them.

He has no interest in the matter, that I can discover.

It is otherwise as to Miner. The defendants, having failed to obtain the security by the mortgage, which he and they expected, for the payment of the balance of their debt due from him, are entitled (as the case now appears,) to be reinstated as his creditor for that balance. The defendants remedy on their note was gone, because the note was given up, or remained in their attorney's hands to be delivered up to Miner. It is therefore

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necessary that he should be made a defendant in the suit, to enable them to have a decree over against him.

The suit may stand over with leave to the complainants to make Miner a party, by a supplemental bill, upon payment of the defendants costs of the hearing.

In regard to the points that the complainants judgment was obtained by fraud, and was satisfied by a levy on sufficient personal property for its payment; I do not find any such issues raised in the answer. The same may be said of the remedy being ample at law. I may add, that there is no doubt of the jurisdiction of the court, both to prevent the sale attempted by the defendants, and to direct a redemption.

Decree accordingly that the suit stand over, and reserving all further questions and directions.

COUTANT v. CATLIN and others.

In estimating and awarding the damages to the owners of lands required for opening and widening streets in the city of New York, the commissioners of estimate and assessment should consider separately the distinct existing interests in each portion of such lands, (*e. g.* those of landlord and tenant,) and make a separate award of the damages to each.

Where their report shows such a separate award, neither party after its confirmation, can impeach its accuracy or have it modified, by showing any error or omission.

But where the report awards all the damages to one of several parties interested, and there is no award to either of the others; it is competent for the latter to prove their interest, and recover from the former their proportion of the award.

Held, accordingly, between a landlord, and a tenant who was entitled to remove his buildings at the end of his term, where the improvement required the buildings to be demolished, and a single award for the whole damages was made to the landlord; it appearing conclusively that a specific part of the damages was assessed by the commissioners for the buildings.

▲ trustee in whom such an award to a married woman had become vested for her benefit, will not be subjected to costs, although unsuccessful in maintaining her right to retain it.

March 5; April 30, 1845. (Also Dec. 2, 1845; Jany. 3, 1846.)

On the tenth day of April, 1810, Nicholas William Stuyvesant

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demised to the complainant three vacant lots of ground at the southeast corner of the Bowery and Stuyvesant-street, (extending on the northerly side to Eighth-street,) in the city of New York, for the term of twenty-one years. The lessee was to pay a rent of thirty dollars annually together with the taxes, and had the privilege of removing his buildings at the end of the term. The complainant erected three wooden dwelling houses on the lots, during the term. In 1831, the lease having expired, it was continued by parol at an annual rent of \$100. In 1836, on a partition of Mr. Stuyvesant's estate, these lots were set off in severalty to one of his daughters, Mrs. Catharine Ann Catlin, the wife of John M. Catlin; upon which the rent was increased to \$150 and the taxes. In February, 1839, the complainant agreed for another year's continuance at the same rent, from the first day of May ensuing, and his right to remove the buildings was still continued. In the year 1839, Art-street, including this part of Stuyvesant-street, was widened on its southerly side, from Broadway nearly to the Third Avenue, and about forty feet of the front of the premises on the Bowery were taken for the street. The improvement also cut off about sixty feet of that part of the lots fronting on Eighth-street. The assessment for the damages of the owners of the property taken, was completed by the commissioners of estimate and assessment, in the latter part of May, 1839, and it was confirmed by the Supreme Court, June 5th, 1839.

Mr. Catlin, having notice of the proceedings of the commissioners, attended before them, and claimed that his wife was the absolute owner of the land required for the widening of the street, and of the lots from which the same was to be taken. He made no statement respecting the buildings, and the commissioners, supposing that those were a part of the freehold and owned by Mrs. Catlin, made a single and entire award for the damages to the lots in question, to Mr. Catlin in right of his wife, estimating the same at \$9144. In arriving at this result, they had the buildings appraised, and their minutes showed that they allowed for damages to the buildings \$1145, and for those to the lands exclusive of the buildings, \$7999. But their report to the court contained no such distribution of the award, it being sim-

ply for \$9144, over and above the benefit to the lots from the improvement of the street.

No objection to the award was made by Catlin. The complainant did not appear to have been informed of the meeting of the commissioners; nor of their assessing the damages to Catlin, until after the report was confirmed.

Upon learning the form of the award, he applied to Mr. Catlin to allow him to receive the sum assessed for the buildings, but the latter refused, on the ground that if he had not supposed the entire award to be for the naked land taken, he would not have submitted to the report.

This bill was thereupon filed on the 29th of October, 1839, against Catlin and wife and The Mayor, Aldermen and Commonalty of the city of New York, praying to restrain the payment of the \$1145 to the former, and to have the error in the award corrected, and that sum paid to the complainant.

Pending the suit, the sum in dispute was paid into court by the city and invested, and the city counsel received his costs.

The testimony of the commissioners confirmed the entry on their minutes, as to the estimate for the buildings and the land respectively; and their report showed that no award was made for the damages to buildings, although two of the houses were to be destroyed by the street widening.

The cause was heard on the pleadings and proofs.

James Smith, for the complainant.

C. V. S. Kane, for Mr. and Mrs. Catlin.

THE ASSISTANT VICE-CHANCELLOR.—At the time the assessment for the widening of Art-street was made, both the complainant and Mrs. Catlin had interests in the land demised which was required for the street; and those interests should have been separately considered by the commissioners of estimate and assessment, and an award made for each.

An award was made to Mrs. Catlin for the whole land taken, and there was no award to the complainant. The report of the commissioners is silent as to the buildings upon the premises.

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This however is consistent with their having regarded Mrs. C. as the owner of the buildings. For it is not necessary, nor is it the practice in these assessments, so far as I have observed them, to describe the buildings or other improvements which are situated upon the land taken, and which with the land itself, constitute the subject matter of the award to the owner of both land and buildings. There is no doubt whatever that in the case before me, the commissioners, acting under the erroneous belief that Mrs. Catlin owned the buildings, included in the award made to her, the sum of \$1145 for the value of those buildings.

The question is, can this error be remedied in this court.

If there had been a separate award to the complainant, however small, so as to show upon their report that the commissioners had his interest under consideration, I am satisfied that their award could not be impeached or modified after the report was confirmed. (*Turner v. Williams*, 10 Wend. 139.)

But here the report itself presumptively awards to Mrs. Catlin, all the damages sustained by the entire freehold, both land and buildings; and the report also shows that no damages were allowed to the person who was the owner of the buildings.

The complainant therefore does not seek to vary the report by showing that the commissioners gave him too little and Mrs. Catlin too much, for their respective interests. The report shows that she obtained the whole interest, and he attempts to prove that he had an interest carved out of the visible freehold, which the commissioners must have regarded in the discharge of their duty. In his proofs, he has gone farther and shown the precise sum which they allowed for the interest which he owned; thereby dispensing with a reference to ascertain the amount, in the event of his obtaining a decree.

The proper mode of assessing these damages, where two or more persons have distinct interests or estates in any parcel of ground required for the street, is to ascertain first the damage to the fee as if it were owned entire and unincumbered by one person, and then to apportion that amount among all the estates and interests which such persons have in the property. (*Wiggin v. The Mayor, &c. of New York*, 9 Paige, 19.)

This rule applies to the case of mortgagors and mortgagees,

and to undivided owners, as well as to lessors and lessees. It was so declared as to mortgagees in the *Matter of John-street*, (19 Wend. 659.)

It is well settled that the mortgagee may intervene and claim the award, although the whole amount of it is given to the mortgagor, where no notice of the right of the former is taken in the report. The case of *Aster v. Miller*, (2 Paige, 68,) and *S. C. nomine, Astor v. Hoyt*, (5 Wend. 603,) is a familiar illustration of that doctrine.

So if in this instance, Mrs. Catlin had in fact been the owner of an undivided half of the land taken, and the award had been made to her alone in the report, describing the whole land, and taking no notice of her co-tenant in common, there is no question but that the latter could have claimed and recovered one-half of the sum awarded.

I do not perceive how it can be otherwise as between the lessor and lessee, where the latter owns the buildings upon the ground which is taken for a street.

The statute clearly contemplates that these awards for damages will sometimes be made to persons who are not entitled to receive the same, and provides a remedy by an action for money had and received. (2 R. L. 418, 419, § 184.)

Whenever the report wholly omits the name of the person who is entitled as part owner or mortgagee, or having an estate in remainder, the same species of proof must be resorted to by such person, to recover under the statute, as is presented in this case. There is no attempt in either case, to open or correct the proceedings of the commissioners.

In this instance they had no evidence before them showing that Mrs. Catlin did not own the buildings, and their award upon the facts before them was right.

Yet the proof is unquestionable that the award was in part for the buildings, and that the complainant was the owner of the same. So that if Mrs. Catlin receives that part of the sum awarded, she will receive money which of right belongs and ought to be paid to the complainant.

It is objected by the defendants, that the complainant ought not to be permitted to claim any part of the award, because he

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did not present his claim to the commissioners. And that if he had brought forward his demand for damages, and the commissioners had entertained it, then Mrs. Catlin would not have been led into the belief that the award to her was for the land exclusively, and would have insisted on a greater sum for her own damages. On the other hand, it is alleged that Mr. Catlin who acted for his wife in this affair, fraudulently suppressed the complainant's ownership of the buildings.

As to the latter charge, the bill does not contain it, and there is not a particle of evidence of any fraud on the part of Mr. Catlin. It would have been prudent in him on presenting the evidence of his wife's title to the land, to have informed the commissioners of the complainant's right to the buildings. He ought to have been aware that the evidence which he furnished, when unexplained, showed his wife to be the owner of the erections as well as the land itself.

His omission to give this information, was no doubt inadvertent; but at the same time, it was a neglect quite equal to the complainant's omission to appear before the commissioners with his claim. It is apparent from the testimony of one of those officers, that if Mr. Catlin had mentioned the separate ownership of the buildings, they would have notified the complainant to appear. Thus, Mr. Catlin's neglect prevented him from receiving a direct notice from the officers themselves; and there is no proof that he had any actual notice of the proceeding, except his own statement in the bill that he heard the buildings were separately appraised at a price with which he was satisfied.

There is no reason upon the score of the complainant's negligence, to preclude him from pursuing his remedy for the damages awarded in respect of his property.

It is next objected, that he had a perfect remedy at law. This point not being raised in the answer, comes too late to be entertained. I do not express any opinion as to its being valid.

The complainant is entitled to receive the sum which was awarded in respect of his buildings on the premises.

This sum is so clearly ascertained, that no reference is necessary.

I do not think it is proper for me to review the commis-

sioners decision as to the value of the buildings. Whether it were right or wrong, it did not affect the amount which they allowed for the naked land taken. They awarded precisely the same for that, as they would have done if no buildings had ever been erected there. If any persons have a right to complain of an excessive valuation of the buildings, it is the class of persons who were assessed for benefit.

It is shown that at the time of the award the interest in the land in question was in Gerard Stuyvesant as the trustee of Mrs. Catlin; and that before this bill was filed, he had transferred the whole award to Helen M. Catlin.

The defendants interpose no objection on this ground, but the court cannot make a decree for the payment of the fund, in the absence of those parties. Nevertheless, as the cause was ably and fully argued on the part of the defendants, I have given my views upon its merits, without awaiting the presence of the assignees.

Decree that the suit stand over for parties, and reserving all further questions and directions.

The complainant filed a supplemental bill against Mr. Stuyvesant, in whom it appeared the claim in controversy was vested in behalf of Mrs. C. A. Catlin; and the cause came on upon the supplemental bill and the equity reserved, on the second day of December, 1845.

James Smith, for the complainant.

C. V. S. Kane, for the defendants.

THE ASSISTANT VICE-CHANCELLOR.—On the principal point, the case as against Mr. Stuyvesant, stands on the same footing that it did when it was before me in April last; and the complainants are entitled to a decree. In regard to costs, J. M. Catlin has had no interest in the question, and was not made a party in respect of the relief sought. He cannot be subjected to costs on the score of the fraudulent conduct now imputed to him, be-

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cause, if it were proved to be fraudulent, there is no charge of fraud in the bill to which the proof would be applicable.

Mrs. Catlin, the real party in interest, is a married woman, and therefore not chargeable with costs. And her trustee has done nothing more than his duty required, in setting up a title, which on the record was presumptively valid in her favor, and then submitting her rights to the judgment of the court.

The fund with its increase, must be paid to the complainants, and the respective parties must pay their own costs of suit.

THE NORTH AMERICAN FIRE INSURANCE COMPANY v. HANDY
and others.

Where a mortgagee, in a suit to foreclose a mortgage seeking a decree over against two joint guarantors; on a defence being made by one, compromised with, and released him; it was held that he could not take a decree for the deficiency against the other guarantor, who had suffered the bill to be taken as confessed, but he was left to his remedy at law.

In equity as well as at law, if the demand against two defendants be joint and not several, a successful defence by one, will enure to the benefit of the other, though the latter suffers the suit to go by default.

On a decree against both in such a case, either party on paying the demand, may proceed upon the foot of the decree, to compel contribution from the other party.
June 23, 1845.

THIS was a suit to foreclose a mortgage for a large amount, executed by F. Vermeule to Silas Butler and Charles O. Handy, and by them assigned to the complainants, with their joint covenant for its collection. The executors of Mr. Butler together with Handy, were made defendants; as also the mortgagor and sundry judgment creditors; and the complainants asked for a decree that Handy and Butler's executors should pay the deficiency of the mortgage, if any there should be uncollected of the lands mortgaged, after exhausting the remedy against the mortgagor.

Butler's executors interposed a defence, and the complainants compromised with them pending the suit, and executed an agree-

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ment not to take any decree against them for the payment of any part of the debt. Handy suffered the bill to be taken as confessed. On the cause coming to a hearing, the complainants took the usual decree for a sale of the premises and a foreclosure of the parties; and they insisted on having a decree against Handy personally for the deficiency.

W. Curtis Noyes, for the complainants.

G. N. Titus, for Butler's Executors.

J. S. Sandford, for Handy.

THE ASSISTANT VICE-CHANCELLOR, said the complainants demand against Handy and Butler's executors was *joint*, and not joint and several.

As the case stood when the bill was filed and when Handy suffered it to be taken as confessed, they could take against Handy, no decree which would not go at the same time against Butler's executors. Therefore when he suffered the bill to go by default, he was assured by the law of the court, that if Butler's executors made out a defence, there could be no decree against him; (in this respect the remedy being like that in an action at law on a joint bond;) and that if they failed in their defence, the decree would be joint against him and them. Either party on paying the debt, could proceed upon the foot of such a decree, to compel contribution from the other party.

The complainants having compromised with Butler's executors under the act of 1838, can take no decree against them. And this bill does not entitle them to a *separate decree* against Handy.

Handy not only claims a right to litigate the demand as the case now stands, but he insists that the compromise discharges him.

Without settling the latter point, the better mode is to decree the sale, and exonerate Butler's executors pursuant to the stipulation, and leave the complainants to their remedy at law or elsewhere, against Handy on the bond.

Storm v. Waddell.—De Kay v. Waddell.

STORM and others v. W. C. H. WADDELL, General or Official Assignee in Bankruptcy.

DE KAY v. THE SAME DEFENDANT, and S. MERRIHEW, Receiver, &c.

The commencement of a suit in chancery by a judgment creditor, whose execution at law has been returned unsatisfied, gives to him an equitable lien upon the things in action of the judgment debtor.

Such was the law of this state before the revised statutes went into operation.

The adjudged cases, bearing upon the point, cited and examined.

The lien acquired by the creditor, is defeasible only by a discharge of the debt, or by a successful defence of the suit in some one of the very restricted modes open to the defendant.

The debtor cannot set up in such a suit, any defence to the original demand, on which the judgment was recovered; nor any irregularity in its entry or in the execution; nor that the sheriff refused to levy on property, unless the creditor colluded with him in his misconduct.

A discharge of the debtor, in bankruptcy or insolvency, from his debts, pending the suit, does not operate to discharge or impair the lien acquired by the commencement of such a suit. The suit may proceed *in rem*, although the person and the future assets of the debtor may in the mean time be exonerated.

On an order being made for the appointment of a receiver in a judgment creditor's suit, and upon the appointment being completed, the property subject to the order vests in such receiver in equity, as of the date of the order, without the execution of any transfer or assignment.

In regard to movable property liable to execution at law, although it is subject to the lien of the creditor, it may be seized on execution by any other creditor, until the order for a receiver is made, but not afterwards; such order being equivalent to an actual levy on the property.

Where a debtor was declared a bankrupt under the act of congress of 1841, upon a petition filed after the commencement of a judgment creditor's suit against him in the court of chancery; it was *held*, irrespective of the proviso in the second section of the bankrupt act, that the assignee in bankruptcy took the debtor's things in action, subject to the creditor's lien acquired by the suit.

Held further, that the right of the judgment creditor in these cases, constituted a lien or security, within the meaning of the proviso in the second section of the act, and is protected thereby.

The word "*securities*," in that proviso, is used in its popular sense, and includes every interest or right attached to, or which is a charge upon, specific property, or which entitles the owner of such right or interest to be paid out of specific property; whether the right be legal or equitable, absolute or contingent.

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The term "liens" in the same proviso of the bankrupt act, is not limited to mere common law liens which are lost whenever their owner parts with the possession of the property. It embraces all cases in which real or personal property is charged with the payment of any debt or duty, without regard to the possession of the property, or the legal or equitable nature of the duty imposed.

An assignee in bankruptcy may avoid an assignment executed by the bankrupt in fraud of his creditors, before the passage of the bankrupt law; but if a judgment creditor files a bill to set aside the assignment, before the proceedings in bankruptcy are instituted, and duly prosecutes his suit; he thereby acquires a lien which cannot be divested or impaired by the assignee in bankruptcy.

This was held in a case where the bill was filed, the subpoena to answer served, and the order for a receiver made, before the petition in bankruptcy was presented to the U. S. District Court; although no receiver was appointed until after the debtor was decreed to be a bankrupt.

The fund in controversy being in the custody of the officers of the court, it was ordered to be paid to the complainant in the creditor's suit, in preference to the general assignee in bankruptcy.

February 10, 11; July 15, 1845.

THE controversy in these causes, arose upon the claim made by the general assignee in bankruptcy in the city of New York, to receive the funds which had been discovered and secured in judgment creditors suits prosecuted in this court against sundry bankrupts. The complainants in the suits, resisted the claim, insisting that they had, by their respective proceedings, acquired a lien upon the funds, prior to the right of the assignee.

It was said at the hearing, that two or three hundred suits were to be affected by the result; and the question thus rendered very important, was the more difficult as well as interesting, in consequence of a decision already made upon the point, in favor of the general assignee, in the District Court of the United States sitting in this city.

In the first suit above entitled, the court at the hearing against the judgment debtor and his assignee, on holding the assignment made by the former to be fraudulent against his creditors; had directed the cause to stand over, so as to bring in the general assignee; it appearing that the debtor pending the suit, had obtained the benefit of the bankrupt act.(a)

(a) See the case reported, *Storm v. Davenport*, ante, Vol. I. page 135.

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The cause now came on to be heard on the supplemental bill, and the answer of the general assignee claiming the whole fund.

The second suit above entitled, was one of interpleader, in which the debtor of one Glover a judgment debtor, attempted to settle the conflicting rights to the receipt of his debt, which were set up on the one hand by a receiver in a creditor's suit, brought by W. W. Chester and others against Glover, and on the other hand by the general assignee claiming under Glover's proceedings in bankruptcy. On filing his bill, the complainant in the second suit, paid the amount of his debt into court. Both the receiver and the general assignee, put in answers, each claiming the whole of the fund.

The details of the two cases will be found stated more at large in the opinion of the court. The two causes were heard in connection.

E. S. Van Winkle, for the complainants in the first suit.

O. Bushnell, for the receiver in the second suit, on the same side.

B. W. Bonney, for the general assignee in bankruptcy.

J. Butler Wright, for G. C. De Kay.

Mr. Van Winkle, made the following points :

1. By the assignment from Davenport to Burke, which was made before the passage of the bankrupt act, Davenport's interest in the assigned property was effectually divested, and that he could never set the assignment aside, it being fraudulent and void only as regards creditors. (*Osborn v. Moss*, 7 J. R. 161; *Mackie v. Cairns*, 5 Cow. 547.)

2. Although the assignee in bankruptcy, by virtue of the decree in bankruptcy, became the trustee for all the creditors of the bankrupt, yet that his rights only reach back to the date of the decree by the statute, and in the utmost to the filing of the petition, except in cases of fraudulent assignments and securities made or given subsequent to the passage of the act. (Act of

Congress, Aug. 19, 1841, § 3; *Ex parte John S. Foster*, 5 Law Reporter, 55; *Hutchins v. Taylor*, 5 *ibid.* 289.)

3. The rights of the assignee in bankruptcy are derived from the third section of the act, which merely gives the assignee the rights and places him *in loco* of the bankrupt at the date of the decree, and that the proviso in the end of the second section cannot be constructed to be a grant of all things not covered by it, but is and must be considered a special reservation by specification, of the things therein mentioned. (*In re Chadwick and Leavitt*, 5 Law Reporter, 457; *In re E. Horton*, 5 *ibid.* 462.)

4. But the claim of the complainant in this case is a lien or other security valid by the laws of this state and not inconsistent with the provisions of the 2 or 5 sections of the Bankrupt Act.

By the service of a subpoena and injunction under their judgment creditor's bill, the complainants obtained a lien or other security on the real and personal property of the defendant Davenport, within the meaning of the second section of the Bankrupt Act.

If not by the service of the subpoena and injunction, yet certainly the complainant obtained such lien or other security by the appointment of a receiver and an assignment to him before the petition in bankruptcy was filed. (*In re Muggridge*, 5 Law Reporter, 351; *In re Allen*, 5 *ibid.* 362; *Downer v. Brackett*, 5 *ibid.* 392; *Houghton v. Eustis*, 5 *ibid.* 505; also 5 Law Reporter, 423; *Kittredge v. Emerson*, 7 *ibid.* 312; American Law Magazine, No. 7, p. 312; *In re Coster*, 1 N. Y. Legal Observer, 53; Dwarris on Stat. 680, 690, 691, 697, 718, 725.)

5. Should the mortgage be declared to belong to the assignee in bankruptcy, the complainants are nevertheless entitled to a priority of payment of their costs out of the proceeds. (*Ex parte Foster*, 5 Law Reporter, 55, 74.)

Mr. Bushnell, for the receiver in the second suit, on the same side, presented the following points:

I. It has ever been the law in this state, that after a judgment creditor had exhausted his remedy at law, by the issuing and return of an execution *nulla bona*, he might file his bill in equity and obtain a lien on all the debtor's estate and effects. (*Spader*

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v. *Davis*, 5 J. C. R. 280; *McDermutt v. Strong*, 4 *ibid.* 687; *Edmeston v. Lyde*, 1 Paige, 637.)

II. Since the revised statutes, there has been no doubt, if any existed before, that a valid equitable lien is obtained by filing a creditor's bill. (*Corning v. White*, 2 Paige, 567; *Utica Ins. Co. v. Power*, 3 *ibid.* 365; *Wakeman v. Grover*, 4 *ibid.* 23; *Grover v. Allen*, 9 *ibid.* 74.)

III. The Messrs. Chesters therefore, by filing their bill against Glover, obtained a valid equitable lien upon the property of Glover, by the laws of the state of New York; a lien which is within the saving of the *second section* of the bankrupt act, which saves from the operation of the act, "*all liens, mortgages, or other securities, on property real or personal which may be valid by the laws of the states respectively.*" (5 Law Reporter, 505 to 507; *Houghton v. Eustis*, 5 *ibid.* 55, 392, 396; 7 *ibid.* 77, 81. 'The cases cited were the same as those by the preceding counsel, and also, *In re Rowell*, 6 *ibid.* 300; *In re Cook*, 5 *ibid.* 443; *Blanchard v. ———*, 5 *ibid.* 351; *Dudley's Case*, Penn. Law Journal, Nov. 1842, page 312.)

IV. 'The word lien in this connection, must be construed in its most enlarged and popular sense, and embraces all liens and securities on property *valid* by the laws of the states.

V. The Chesters then acquired an *equity lien, a superior equity*, which should be protected by the court sitting in bankruptcy. It is no longer a contingent or conditional right, but it has attached absolutely to the property, and by the laws of New York it remains a fixed and positive lien until the complainants judgment is satisfied. (*Lansing v. Easton*, 7 Paige, 364; *Waring v. Robertson*, 1 Hoff. Ch. R. 532; *Hartun v. Bishop*, 3 Wend. 13; *Sea Insurance Co. v. Ward*, 20 *ibid.* 588.)

VI. By the appointment of a receiver which was before the bankrupt's petition, the Chesters through the receiver and in the name of the receiver, clearly became entitled to all the property of Glover. By the deed of assignment to him, the receiver obtained at law title to it, and could maintain an action for it.

VII. It is well settled, "*that in bankruptcy the general assignee takes only such rights as the bankrupt himself had and is subject to the like equities.*" (5 Law Reporter, 308 and 368,

per Story, Justice ; 7 *ibid.* 82, per Chief Justice Parker ; 6 *ibid.* 347, 352, and 444.)

Mr. Bonney, for the general assignee in bankruptcy, made the following points, in the first suit, and referred to the same as far as applicable in the second suit.

I. Upon the making of the decree of bankruptcy on the 25th February, 1843, all property and rights of property which were of the bankrupt Davenport, were, *ipso facto*, vested in defendant Waddell, assignee, &c., for the use and benefit of the creditors of said bankrupt. (Bankrupt Act of 1841, sec. 3.)

II. The said decree of bankruptcy takes effect, by relation, from the time of the filing of the original petition, and vests in the assignee all property and rights of property which were of the bankrupt when said petition was filed, on 24th January, 1843. (*Matter of Rust*, 1 N. Y. Legal Observer, 326 ; *Matter of Allen*, 5 Law Reporter, 362.)

III. The assignment made to Davenport by Burke, on 7th August, 1842, of the mortgage in question, was a fraud upon the said act and void as against the assignee, (Waddell,) who by virtue of such decree was entitled to claim and receive the same as part of the assets of the bankruptcy. (Bankrupt Act of 1841, sect. 2.)

IV. Neither at the time of the filing of the original petition in bankruptcy, (24th January, 1843,) nor at the time of the making of the decree of bankruptcy, (25th February, 1843,) had the complainants by their judgment creditor's bill or any proceedings thereon, acquired a lien or other security upon the said mortgage, valid by the laws of the state of New York, within the meaning of the last proviso of the second section of the bankrupt act, so as to entitle them (complainants) to the exclusive benefit of said mortgage as against the other creditors of said bankrupt, or against the assignee who represents all the creditors.

(The counsel cited under this, his principal point, in addition to many of the authorities mentioned by the opening counsel; the following, viz. : Bankrupt Act, § 2 and 5 ; 2 R. S. 173, § 38, 39 ; *Matter of J. H. Coster*, 1 N. Y. Legal Observer, 53 ; *Hadden v. Spader*, 20 Johns. 554 ; *Beck v. Burdett*, 1 Paige,

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305; *Edmeston v. Lyde*, 1 *ibid.* 637; *Clarkson v. De Pester*, 3 *ibid.* 320; *McElwain v. Willis*, 9 *Wend.* 548. He contended that the right acquired by a judgment creditor's bill had never been decided to be a lien in any of our state courts; that all that appeared in the books in favor of the proposition were *obiter dicta*; and that the whole proceeding was founded upon the revised statutes, and never existed before.

He also cited *Kittredge v. Emerson*, 7 *Law Reporter*, 312; *In re Bellows and Peck*, 7 *ibid.* 119; *Smith v. Gordon*, 6 *ibid.* 313; *Sylvester v. Reed*, 3 *Edw. Ch. R.* 296; *Mathews v. Neilson*, 3 *ibid.* 346; *Conard v. Atlantic Ins. Co.* 1 *Peters*, 386.)

V. This court having heretofore adjudged the assignment of the mortgage in question by Davenport to be void, and retained the cause for the purpose of settling the claims of the complainants and the assignee (Waddell) to such mortgage, may under this bill, decree the said mortgage to the assignee in bankruptcy and order its officer (the receiver) to assign and deliver the same and all proceeds thereof to him.

The court will make such decree in relation to costs as shall be equitable.

THE ASSISTANT VICE-CHANCELLOR.—The principal and most important question discussed in these causes, is presented in the most simple form, in the second suit. I will therefore consider it in the first instance, in reference to that suit.

The bill of De Kay is one of interpleader. He is the debtor of Glover, a bankrupt, and each of the defendants claims to be entitled to receive the debt. Mr. Merrihew is a receiver appointed by this court, in a suit commenced by Chester and others, judgment creditors of Glover, for the purpose of reaching his equitable interests and things in action; and founded upon the return of an execution at law against his property wholly unsatisfied. This creditor's bill was filed on the 28th day of October, 1842, and a subpoena to answer, accompanied with an injunction restraining the defendant from transferring his effects or doing any act to enable others to obtain a preference over the complainants, was served on Glover on the next day. On the 10th day of No-

venber, 1842, the usual order for the appointment of a receiver of the property and effects of the debtor was granted on motion, and entered in the minutes of the court; and on the 17th day of the same month, Mr. Merrihew was duly appointed such receiver, and executed the requisite bond. On the 30th day of November, ✓ Glover executed to the receiver a formal assignment of his property, pursuant to the directions of the order for a receiver.

The receiver claims to have obtained, by these proceedings, a lien upon the debt due from De Kay to Glover, and that the same must be applied towards the satisfaction of Chester's judgment and the costs of their creditor's suit.

The official assignee claims the same debt by virtue of a decree declaring Glover to be a bankrupt in pursuance of the act of Congress, entitled "An act to establish an uniform system of bankruptcy throughout the United States," passed August 19, 1841.

Glover's petition for the benefit of this act, was filed on the 23d day of November, 1842, in the District Court for the Southern District of New York, and he was decreed to be a bankrupt within the purview of the act, on the 24th of December following.

These conflicting claims must be determined by the nature of the right which Chester & Co. acquired in the things in action of Glover, by force of their creditor's suit in this court; and by the effect of the bankrupt act thereon consequent upon the petition and decree in the District Court in the matter of Glover's bankruptcy.

Without pausing here to inquire what was the effect, as to third persons, of the creditor's suit against Glover; I am confident no one who is acquainted with that proceeding as conducted in this state, will doubt but that as against Glover himself, Chester & Co. thereby acquired a right to the debt due from De Kay, which could only be defeated by a successful defence of their suit. This right thus defeasible, could not be divested short of payment of their demand. The defence which could be made to their suit, was very restricted. Their judgment was conclusive, unless fraudulently obtained; and no mere irregularity in its entry, or in the issuing or return of the execution, would avail the defendant Glover. Nor would he be permitted to show that the sheriff refused to levy on his property subject to execution,

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unless he could also prove that Chester & Co. colluded with the sheriff in such misconduct. Unlike the ordinary case of a suit at law to establish and recover a debt, the debt of Chester & Co. was already proved by their judgment.

It thus appears that their right to the De Kay debt, upon exhibiting their bill, although defeasible, was no more likely to be defeated, than that of a mortgagee filing his bill to foreclose a mortgage; and the grounds of the defence, in the case of a mortgage are no more if as much restricted, as were those of Glover in the creditor's suit.

No subsequent act of Glover could defeat such right. If he had made an assignment to one ignorant of the injunction, or had procured a discharge from his debts under our insolvent law on the petition of two-thirds of his creditors; the assignee in either case, would have received the demand against De Kay, subject to the prior right of Chester & Co.

Did the bankrupt act and Glover's proceedings under it, impair or defeat this right?

And *first*, without reference to the proviso, which has been the subject of such able and elaborate arguments at the bar.

The third section of the act declares the rights of the assignee in bankruptcy. By force of the decree, all the property and rights of property of the bankrupt, (except such as should be allowed to him and his family by the assignee,) were divested out of the bankrupt, and vested in the assignee. And the latter was vested with all the rights, titles, powers and authorities, in respect of the same as fully to all intents and purposes, as the same were vested in or might be exercised by such bankrupt, before or at the time his bankruptcy was declared.

There is no other provision in the act on this point, which enlarges the title or interest of the assignee in respect of the demand now under consideration.

His right is therefore left to stand upon the general principle applicable to insolvency and bankruptcy, both in this country and in England, that the assignee takes only such rights as the insolvent or bankrupt had, and subject to all the equities which affect the assignor. (*Mumford v. Murray*, 1 Paige, 620; *Smith*

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v. *Kane*, 2 id. 303; *Van Epps v. Van Dusen*, 4 id. 64; 2 Story's Eq. Jurispr. § 1411.)

Under the English bankrupt acts, this principle is qualified in certain instances, by relation to the time of the commission of an act of bankruptcy. But under the statutes of the various states, which are usually put in motion by the bankrupt or insolvent for his own relief, it is generally made applicable to the institution of the proceedings.

This view of the bankrupt act of 1841, has received the sanction of very high authority.

In the matter of *Muggridge*, in the first circuit of the U. S., New Hampshire District, September 12, 1842, (5 Law Reporter, 351, 358, and now reported, 2 Story's R. 334, *nomine*, *Parker v. Muggridge*.) Mr. Justice Story, says that if there had been no such saving in the act as the proviso in the second section, the liens, mortgages and other securities within the purview of the saving, would have been saved by mere operation of law, from the natural intendment of the statute, which did not mean to disturb existing vested rights and interests in property. Also that the property will be followed and affected with the trust in the hands of the assignees, in the same manner and to the same extent, as it would be in the hands of the bankrupt; citing several English authorities. He further says, "But if no such case ever existed, I should have no doubt, upon principle, that such ought to be the result. But there are many cases which stand on analogous grounds. We all know that in bankruptcy, the assignee takes only such rights, as the bankrupt himself had, and is subject to the like equities."

In *Mitchell v. Winslow*, in the Maine District, October, 1843, (2 Story's Rep. 630, and 6 Law Reporter, 347, 352,) the same eminent jurist says, "it is a well established doctrine, (except in cases of fraud,) that assignees in bankruptcy take only such rights and interests as the bankrupt himself had, and could himself claim and assert at the time of his bankruptcy; and consequently they are affected with all the equities, which would affect the bankrupt himself, if he were asserting those rights and interests." And the learned judge supports his position by a reference

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to decisions from the time of Lord Hardwicke to that of Lord Lyndhurst, at law as well as in equity.

In *Windsor v. McLellan*, (2 Story's R. 493,) S. C., as the *Matter of McLellan*, (6 Law Reporter, 440,) in the District of Massachusetts, October, 1843, Judge Story re-affirmed the same doctrine in equally strong language. He says the assignee in bankruptcy takes the property "in the same plight and condition that the bankrupt himself held it, and subject to all the equities which exist against the same in the hands of the bankrupt." For further illustrations and applications of this principle by the same distinguished judge, see *Ex parte Newhall*, (2 Story's R. 360;) *Fletcher v. Morey*, (ibid. 555;) and *Fiske v. Hunt*, (ibid. 582.)

Although the policy of the act was to distribute the assets of the bankrupt equally, such policy was intended to apply to the rights and interests which he had, not to those which were vested in others while he still retained a qualified interest in the property. Aside from the proviso in the second section, there is nothing in the act which authorizes the inference that Congress intended to give such a monstrous and unprecedented effect to it, as to take away rights vested or acquired in good faith; whether they were legal or equitable, express liens or constructive trusts. It is only from the time of the decree, that the property and rights of property are divested out of the bankrupt, and the act in distinct terms divests from him such rights as he has at the time of the bankruptcy and no more, and his assignee can enforce them as fully as he might at that time, and not otherwise. See upon this subject, the reasoning of the Supreme Court of New Hampshire, in *Kittredge v. Warren*, (7 Law Reporter, 77, 82;) and of Judge Betts in the *Matter of Brown*, (1 N. Y. Leg. Obs. 72.)

I leave out of view the distinction between a voluntary assignee of the debtor, and an assignee by operation of law, as in bankruptcy or insolvency. The latter may avoid the conveyances and transfers of the assignor made in fraud of his creditors which the voluntary assignee is incapable of doing; but in the case of De Kay the difference has no bearing.

If then the assignee under the bankrupt act of 1841, took no other or greater right than Glover himself had at the time of his bankruptcy, it seems to me that there is an end of the question.

Before Glover filed his petition in the court of bankruptcy, Chester & Co. had acquired a right in the debt due from De Kay, and the debt itself had been divested from Glover, and vested in the receiver. His title to it was gone, and he retained no further interest in it, than this, that he might possibly defeat the suit of Chester & Co., and he might regain or redeem the debt by paying their demand.

His procuring a discharge in bankruptcy, would have no effect whatever upon the right which Chester & Co. acquired by their creditor's suit. It was *the property* of the judgment debtor, not a new judgment against him, which they sought by their bill. If they failed in discovering property, their suit would fail. Thus their proceeding was against the specific effects, not the person of Glover; and if available, would become so by force of the discovery of such effects existing at the time of filing their bill. On such effects, they obtained a vested right for payment, and a subsequent discharge of their debt by operation of law, could not divest that right.

In De Kay's case, it makes no difference whether the right by the creditor's suit vested on the service of the subpoena, or on the order for, or appointment of the receiver. There is no occasion to go beyond the appointment, because by force of the order and appointment, (if not by the order alone,) Glover's right in the debt of De Kay was transferred to the receiver. The execution of the assignment to the receiver gave to him no new right. Such assignment is convenient to establish a legal title, and has become customary in these suits; but it is the order of the court which works the transfer of the right of the judgment debtor.^(a)

SECOND. These causes have been fully argued upon the effect of the proviso in the second section of the bankrupt act. And perhaps the creditors stand stronger upon the proviso, than they do upon the general principle which I have discussed. It is therefore proper that I should consider the question as it is presented in this aspect.

The proviso is in these words: "And provided also, that no-

(a) See to this effect, *Mann v. Potts*, ante, page 257.

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thing in this act contained shall be construed to annul, destroy or impair any lawful rights of married women, or minors, or any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the states respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act."

It is not alleged that there is any thing in the second or fifth sections of the act, which militates against the receiver's right to the benefit of this provision, if it be brought within its terms. But it is strenuously contended on the part of the official assignee, that the right which the receiver represents, *is not such a lien or security, valid by the laws of this state; as comes within the saving clause of the bankrupt act.*

First. What is the meaning of a lien or security on property, real or personal, in this proviso?

The terms used are not synonymous, nor is it to be supposed that Congress would load a statute with words purely superfluous. The word *security*, is the most general term, and in its usual acceptation embraces liens as well as mortgages. But it is not a legal phrase. It signifies, *that which makes secure or certain*; in its proper use it relates to pecuniary matters; and often consists of a promise or right not attended with possession of the thing upon which it reposes. It implies, in its common acceptation, that which prevents loss, or makes safe. Dr. Johnson defines it as, "any thing given as a pledge or caution." Dean Swift used it as synonymous with "safety, certainty." Dr. Webster gives us six definitions of the word, one of which is, "safety, certainty," and another is, "Any thing given or deposited to secure the payment of a debt, or the performance of a contract; as a bond with surety, a mortgage, the indorsement of a responsible man, a pledge, &c."

It is not to be found in the old law dictionaries. Bouvier, defines it as *that which renders a matter sure; an instrument which renders certain the performance of a contract.* (2 Bouv. Law Dict. 493.)

I have no doubt that the word *securities* in this proviso was used in its popular sense. Congress had provided in the words which precede it, for *liens* and *mortgages*, the former, a very

comprehensive term of itself; and the generic term *securities* was added to sweep into the proviso, every other vested right which was attached to, or was a charge upon property.

These terms are to be construed in a liberal and enlarged sense. Else what becomes of the very numerous rights in property, which are known as *privileges* in the state of Louisiana? No such legal word as *lien*, is known to the laws of that state, and there *mortgages* are a distinct class of interests. The literal words of the proviso, leaving out of view "other *securities*," viz., *liens and mortgages on real or personal property*, convey but little of their intent, in a state where liens, as such, are unknown, and where no property is recognized as being real or personal. Without going more minutely into this discussion, I will say at once, that the term "*securities*" in the bankrupt act, in my view, includes every interest or right, attached to or which is a charge upon specific property, or which entitles the owner thereof to be paid out of specific property; whether legal, or equitable, absolute or contingent.

In the *Matter of Muggridge*, before cited, (5 Law Reporter, 351; 2 Story, 334;) Judge Story treats the proviso in the manner which I have attempted to illustrate, and he upheld a right in property as founded upon a contract, because it created an equitable lien or security, or a constructive trust in the property; and gave to the claimants a superior equity therein to that of the general creditors represented by the assignee.

The word "*lien*" is of well known signification.

In law, it signifies an obligation, tie or claim, annexed to, or attaching upon any property; without satisfying which such property cannot be demanded by its owner. (4 Jacob's Law Dict. by Tomlins, 159.)

In a late law dictionary it is thus defined: "In its most extensive signification, this term includes every case in which real or personal property is charged with the payment of any debt or duty; every such charge being denominated a lien on the property. In a more limited sense, it is defined to be a right of detaining the property of another until some claim be satisfied." (2 Bouvier's Law Dict. 54.)

In the every day use of the term, *liens* include mortgages, as

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well as the more restricted interests which one may hold in the property of another. And I think there is no doubt but that its usual and accepted meaning is quite as extensive as the definition of it which I have given from Tomlin's Jacob.

There is no reason to suppose that Congress intended to limit the proviso to common law liens, which exist only where the party entitled to it has possession of the goods, and which are lost whenever he parts with the possession. This is one of the smallest classes of liens known to our jurisprudence. There are numerous statutory liens, and liens by the maritime law, some of which require possession to accompany them, while others exist independent of possession. And besides these, there are the diversified liens in equity, some with, and more without, regard to possession of the property; which as is said by Judge Story, are rather deemed a charge upon the thing, than either a *jus in re* or a *jus ad rem*. I refer for instances of equitable liens to 1 Story's Eq. § 506; 2 *ibid.* § 1215 and *succ.*; and § 1411.

Nor do I find any distinction in the proviso, between absolute and conditional liens. Although the latter may be defeated by the condition, they are nevertheless liens, until the contingency happens.

In the *Matter of Coster*, (1 N. Y. Legal Observer, 53, 54,) the learned judge of the U. S. District Court in the Southern District of this State, said that the word *lien* has been understood and expounded here as used in a familiar sense, and as comprehending all privileges and charges upon the thing, recognized by local statutes, long established usages, or the general law; and that in his judgment, the word *lien* in the bankrupt act, imported any charge fixed by law upon the property, or imposed by the party, in consonance with existing laws and usages. And see the *Matter of Allen*, (5 Law Reporter, 362,) in the Northern District Court, per Conkling, J.

I have already mentioned *Parker v. Muggridge*, (5 Law Reporter, 357; 2 Story, 334;) where Judge Story decided that an equitable lien is as much within the act as a legal lien; and gave effect to a trust or security, which was such by operation of law. (See also his observations in *Ex parte Foster*, 5 *ibid.* 62;

2 Story's R. 131 ; and the case of *Kittredge v. Warren*, 7 *ibid.* 82.)

In *Downer v. Brackett*, (5 Law Reporter, 394,) Judge Prentiss of the U. S. District Court in Vermont, said that in common acceptation, *lien* is understood and used to denote a legal claim or charge on property either real or personal, for the payment of any debt or duty. By *legal*, I understand the learned judge to mean, lawful or recognized by law ; and in that sense his definition embraces all the classes of liens which I have mentioned.

And in *Houghton v. Eustis*, (5 *ibid.* 507,) in the U. S. Circuit in the same District, that eminent judge the late Mr. Justice Thompson, said that in his opinion it was the purpose of the bankrupt act to preserve all the securities upon property, which although unknown to the common law, are by the laws of the respective states as essentially a lien upon the property, as those existing at common law.

Under the English system of bankruptcy, the variety of *liens and securities* which are respected in its administration is very great. (See Archbold's Bankruptcy, by Flather, 139 to 147 and 149.) And so far is the striking of a docket from cutting off such liens, or driving the creditor having a legal lien into the bankrupt court to enforce his claim, that it is held that the court has no jurisdiction in bankruptcy against a creditor who obtains execution before the bankruptcy, unless he voluntarily comes in under the fiat. (*Ex parte Botcherley*, 2 Glyn & J. 367.)

The liens and securities in the saving clause in the second section of the act, are such as *may be valid by the laws of the states respectively*. They are not restricted to such as are created by the statutes of the states, but I apprehend, include all liens and securities known to the municipal law of the states, whether they are cognizable at law, in equity, or in admiralty. In this respect the bankrupt act, in the language of Judge Ware, adopts the laws of the states respectively ; and in this instance as in others, we are to ascertain what those laws are, by the statutes of the states and their judicial rules and decisions.

I am aware that the Supreme Court of the United States have held that where a question arises, which is governed by the general principles and doctrines of commercial jurisprudence, they

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will not be controlled by the *judicial decisions* of the courts of the state where the question arose. (*Swift v. Tyson*, 16 Peters, 1.) But this is wholly different from the usage of that court in questions growing out of real estate, and others of a local character; and I suppose the departure from that usage was on the ground that a question of commercial law turned, not upon the law of any one state, or of the United States, but upon the law merchant of the whole commercial world.

For further illustrations of this subject, I refer to the *Matter of Coster*, before Judge Betts, cited above; *Smith v. Gordon*, (6 Law Reporter, 313,) per Ware, J. in the U. S. District Court in Maine; *Matter of Muggridge*, (5 *ibid.* 351, and 2 Story, 334,) before cited; *Matter of Allen*, (5 *ibid.* 362;) *Downer v. Brackett*, cited above, (5 *ibid.* 392;) *Houghton v. Eustis*, (5 *ibid.* 505;) and *Dudley's Case*, (1 Penn. Law Journal, 308,) in the U. S. Circuit Court, per Baldwin, J.

The next inquiry is, whether by the creditor's suit in this case, Chester & Co. acquired a *lien* or *security* on the judgment against De Kay, according to the laws of this state. In other words, did their suit create a charge upon that thing in action, which entitled them to payment before the bankrupt could resume or dispose of it?

The practice of filing bills in this court by unsatisfied judgment and execution creditors, to reach the things in action of the debtor, which has become so well established and familiar, is usually referred to the revised statutes as its origin. (2 R. S. 173, 174.) The statute is undoubtedly sufficient to sustain all the argument that was presented in support of the effect of such a suit; but as I desire to refer to cases prior to the time when the revised statutes went into operation, I will advert briefly to the earlier history of this jurisdiction.

The power of the Court of Chancery to aid the creditor in removing fraudulent impediments in the way of levying on the personal property liable to execution, or selling the real estate of his debtor; is an old established ground of jurisdiction, which is not in question here. The bill in those cases was auxiliary to the carrying into effect the process of the law courts, and differed

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from our creditor's suit now under consideration, in this, that in the suit to set aside a fraudulent conveyance of land, so as to give effect to a judgment, the bill need not allege any thing more than the recovery of the judgment, and where it was to remove an obstruction affecting movable property, it was only requisite to allege an execution issued to the county where the property was situated; while in the creditor's bill against equitable interests and things in action, the creditor must show the issuing of an execution and its regular return unsatisfied.

In the case of *Spader v. Hadden*, (5 J. C. R. 280,) Chancellor Kent, in 1821, sustained a creditor's suit of the description now in use, against monies in the hands of Hadden, which arose from property transferred to him by the debtor, the transfer being fraudulent against creditors. This decree was affirmed by the Court for the Correction of Errors in November, 1822; (20 Johns. 554.) A majority of the court concurred with Chief Justice Spencer and Mr. Justice Woodworth, (the latter delivered the prevailing opinion,) in holding that the case was one of acknowledged equitable cognizance. And the reasoning of the judge is applicable as well to the case of the funds being in the debtor's hands, as to the case decided.

It is true that in *Donovan v. Finn*, (Hopkins' R. 59, 77,) decided in November, 1823, the Chancellor omitted to follow the result of the decision in *Hadden v. Spader*, and viewed the latter as a case of trust and fraud. But I submit with great respect, that there was much more in the decision than was acceded to it in *Donovan v. Finn*. The goods assigned in *Hadden v. Spader*, were sold and converted into money, five months before Spader recover his judgment, so that there was no property on which his execution could have become a lien. It was then the plain case of a debtor having things in action in the hands of a third person; and equity deemed it unjust that either the one or the other should withhold them from the payment of his creditors.

The doctrine of *Donovan v. Finn*, has not been followed in any case since, nor so far as I have seen, approved by more than two judges. There is abundant evidence that it was not deemed in accordance with the decision of the highest court in *Hadden v. Spader*; and aside from the books, I know from my own

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practice, that it was disregarded prior to the time of the revised statutes. In the following cases, the contrary was decided, or opinions to that effect given.

In *Weed v. Pierce*, 9 Cowen, 722, 727, decided by Chancellor Walworth, when Circuit Judge, sitting in equity, December, 1827; *Beck v. Burdett*, 1 Paige, 305, January, 1829; *Candler v. Pettit*, 1 *ibid.* 427; affirmed on appeal in December, 1829, 3 Wend. 618, 621, 625; and *Edmeston v. Lyde*, 1 Paige, 673, November, 1829; In *Wakeman v. Grover*, 4 Paige, 23, affirmed 11 Wend. 187, the bill was filed in 1828, to reach the things in action assigned as well as the goods of Grover and Gunn, and the decree was made against both species of property without discrimination, although the case was most desperately contested throughout. The Chancellor repeated the doctrine of the above cases at page 33 of 4 Paige. And as recently as in 1844, he reiterated it in *Farnham v. Campbell*, 10 Paige, 601.

See also the revisers notes in introducing the provisions on the subject, which are contained in the revised statutes. (3 R. S. 669, 2d ed.)

I may therefore assume, that by the law of this state as settled more than twenty years before this case arose, an unsatisfied execution creditor had a right to file a bill in this court to compel payment of his debt out of the equitable interests and things in action of the judgment debtor.

I will now endeavor to show what is the effect of such a bill, when filed and duly prosecuted.

Before filing it, the creditor must have obtained a judgment, or a decree for the payment of money, issued his execution against both the real and personal property of his debtor, and had it actually returned and filed. And he must state in his bill under oath, that the sum claimed upon his judgment or decree, is due to him, over and above all claims of the debtor by way of offset or otherwise. This makes a case, which leaves little room for contingency or uncertainty in the result of the suit, so far as the complainant's debt is concerned. His cause of action must be upon the records of some court of law, which of themselves are evidence of the existence of the debt.

Upon filing the bill, an injunction is taken out and served with

the subpoena to answer, restraining the debtor from parting with any of his property or effects till the farther order of the court. And for the better protection of the property, and its conversion into money, a receiver is speedily appointed, who under the order of the court, is vested with all such property, (or with sufficient specific portions of it, to pay the complainant's debt and costs, and all prior claims upon the same,) and the debtor is compelled to assign and deliver such property to the receiver under the direction of a master of the court.

Unless the defendant can make a defence on some one of the very narrow grounds open to him, the decree presently ensues, which directs the receiver to pay to the complainant out of the fund in his hands, the judgment with interest, and the costs of the suit.

If there are several creditor's suits, each complainant is paid according to his priority, as ascertained by the time of the filing of the respective bills and serving the process to answer.

This is an epitome of the course of proceeding. Without regard to the injunction, the property of the defendant is subjected to the suit, wherever it may be, if the receiver can lay hold of it, or the complainant can reach it by the decree. The injunction, when served, prevents the debtor from putting it away or squandering it.

The suit does not affect property acquired by the debtor after its commencement. A supplemental bill, or a proceeding of the like nature, is necessary to subject such property to the debt.

A receiver is a convenient and important, but not indispensable part of the proceeding. The effects locked up, as it were, in the hands of the debtor by the injunction, may be decreed to be delivered to the complainant, or sold by a master and applied in satisfaction of the debt and costs.

No voluntary assignment of the debtor can impair the complainant's right, nor any intervening claim of other creditors.

I speak in this outline, of equitable interests and things in action. Other personal property will be noted hereafter. And as to lands, I need only say, that the court acts upon the rents and profits, where the legal title or the right to the possession is in the debtor.

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It is conclusive to my mind, that the right thus acquired by the creditor, is a *charge* upon the things in action which the debtor had at the commencement of the suit. It is so far contingent, that it may possibly be defeated, by the event of the suit; although in this respect, the result is unmeasurably more certain, than in the suits by attachment in our sister states for the collection of ordinary debts. And except on this contingency, it is an absolute claim, to be divested only on satisfaction of the debt and the costs of the suit. It is just as certain and effectual upon the effects discovered, as a mortgage or judgment is upon the lands thereby incumbered.

If I am right in this result, Chester & Co. had a lien or security upon the property in question, which was within the proviso of the bankrupt act.

This conclusion is strongly fortified by the course of decisions in this state, and the language of our equity judges.

In *McDermutt v. Strong*, (4 J. C. R. 687,) the right was upheld as a *lien* upon the equitable interest sought by the bill.

The argument of the appellant's counsel in *Hadden v. Spader*, was upon the ground that the creditor *must establish a lien*.

In *Weed v. Pierce*, (9 Cowen, 728, 729,) Chancellor Walworth held that the creditor in a bill of this kind, acquired a *specific lien* upon the fund by the commencement of his suit.

In *Beck v. Burdett*, (1 Paige, 305, 309,) he declared his opinion, that the filing of a bill, after the return of an execution at law, gave to the plaintiff a *specific lien* on the fund or property not liable to execution at law; but the execution not having been returned in that case when the bill was filed, the Chancellor dismissed the suit.

In *Edmeston v. Lyde*, (1 *ibid.* 639, 640,) the same opinion is repeated by the Chancellor.

The foregoing cases were before the revised statutes.

In *Eager v. Price*, (2 Paige, 333, 338,) Chancellor Walworth held that by filing a judgment creditor's bill, the creditor acquired a *specific lien* on the property which the debtor had at the commencement of the suit, but that a supplemental bill was necessary to obtain a lien upon after acquired property of the debtor.

In *Corning v. White*, (2 *ibid.* 567,) the debtor set up in his an-

swer that there were other unsatisfied execution creditors. The Chancellor overruled the defence, and held that the creditor who first files his bill obtains a preference. He says, "The filing of the bill here under the provisions of the revised statutes, *operates as an attachment of property which cannot be levied on at law.* It gives to the vigilant creditor a right to a priority in payment, and the creditor who next files his bill, *will have the second lien.* An assignment under the insolvent acts, after the commencement of the suit, only gives to the assignee a right to the surplus, after the payment of the complainant's debt."

In *Clarkson v. De Peyster*, (3 Paige, 320,) the Chancellor on holding that a creditor might file a bill of this description founded on a decree in equity, again speaks of the right acquired under it, as *an equitable lien.*

In *The Utica Insurance Company v. Power*, (3 *ibid.* 365,) the Chancellor declared that by the creditor's suit, the complainants acquired a *specific lien* on the demand in question.

Bloodgood v. Clark, (4 Paige, 574,) was a case upon the appointment of a receiver, in which the Chancellor in support of a speedy appointment, says in effect, that the sworn bill of the complainant shows presumptively that he has an equitable right to all the funds and property of the defendant to satisfy his debt. In *Ames v. Blunt*, (5 Paige, 13, 24,) he again speaks of the bill as giving to the complainant *a lien* on the property in controversy.

In *Burrall v. Leslie*, (6 *ibid.* 445,) where eight creditor's bills had been filed against the same judgment debtors, before the Chancellor and different Vice-Chancellors, there had been a reference to a master under the Chancellor's order to settle the creditors priorities, and they were reported to be entitled, in the order of their respective suits. The Chancellor made a decree accordingly.

This case, with *Corning v. White*, shows that the *lien* obtained by these bills, is not a mere form of words, or operative only against the debtor. As between the creditors, it overrules the equitable principle of equality, in thus rewarding superior vigilance.

In *Lansing v. Whitbeck*, (7 Paige, 364,) which was much

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relied on by the counsel for the assignee as showing an inconsistency in the doctrine contended for, the Chancellor held that in regard to *chattels liable to execution at law*, the title of the defendant was equitably divested by an order for its sequestration or for the appointment of a receiver; and that although by the creditor's bill, the complainant acquired *an equitable lien* thereon, yet before such order, that lien would not be protected against the *legal right* obtained to it by another creditor who levied upon it an execution at law. The same doctrine as to the force of such a levy is repeated in *Storm v. Badger*, (8 *ibid.* 130.)

Whatever may be the true grounds of the rule, it does not affect the force of the lien of a creditor's suit, upon *equitable interests and things in action*. In the absence of an authoritative exposition of the reasons, I submit that the decision may be upheld on the following. The object of these suits is to remedy the defect of legal process in the collection of debts. There is no difficulty in obtaining satisfaction out of the chattels of the debtor, in ordinary cases, by sale on execution. And the creditor who first levies his execution on such chattels, is entitled to a priority by his greater vigilance. The effecting of such a levy, indicates that the remedy at law was not imperfect, and as that is the principal remedy, and the one in equity is ancillary, the former should take precedence, so long as the possession and title remain in the debtor. But when the proceeding in equity, by an order for a receiver or otherwise, has made what is equivalent to an actual levy in behalf of the suitor in this court, he is then the vigilant creditor and obtains the prior lien.

The case of *Grosvenor v. Allen*, (9 Paige, 74,) arose under the statute which subjects the interest of persons holding contracts for the purchase of lands, to the same proceeding in this court as the creditor's suit, upon an execution being returned unsatisfied. (1 R. S. 746, § 4, 5.) Nothing is said in the statute relative to priority or lien. The Chancellor decided that neither the judgment or execution, constituted a lien upon the debtor's interest under such a contract, but he says that the commencement of a suit in this court under the statute, would give to the creditor an equitable lien thereon.

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In *Lentilhon v. Moffat*, (1 Edw. Ch. R. 451, 466,) Vice-Chancellor McConn said the complainants had "acquired a *lien* to the amount of their judgments," by their creditor's suit which he was then deciding.

In *Tuthill v. Lupton*, (1 *ibid.* 561,) in denying a motion of the defendant to be permitted to use a portion of his effects in order to defend the creditor's suit, the Vice-Chancellor said, "the complainant has acquired a *prima facie lien* on this money, and the defendant must rely upon his subsequent earnings for the means of making his defence."

In *Albany City Bank v. Schermerhorn*, (1 Clarke's Ch. R. 297,) Vice-Chancellor Whittlesey held that the filing of a creditor's bill created a *lien* upon the things in action and equitable assets of the judgment debtor. In *Boynton v. Rawson*, (1 *ibid.* 584, 589, 594, 595, 596,) V. C. Whittlesey repeated the doctrine that the creditor's suit creates such a *lien*, and decided that as between different creditor's suits, the one in which the subpœna to answer is first served, has priority.

Certain cases in our own courts, were mentioned as containing a different doctrine, to which I will now refer. *White v. Carpenter*, (2 Paige, 217, 242, &c.) was not a creditor's suit; and the point of the decision was that an equitable lien on specific property, has preference over the general lien of a subsequent judgment.

The Chancellor's expressions in *Osborn v. Heyer*, (2 Paige, 343,) merely show that although the receiver obtains the assets in a creditor's suit, it may turn out that there are prior equitable claims which are paramount to those of such creditor. *Lansing v. Easton*, (7 *ibid.* 364,) I have already mentioned.

In *Sylvester v. Reed*, (3 Edw. Ch. R. 296,) and *Mathews v. Neilson*, (3 *ibid.* 346,) the Vice-Chancellor refused to revive a creditor's suit against the administrators on the death of the debtor, on the ground that the statute regulating the distribution of the estates of decedents requires the payment of all judgments alike without preference. At the same time, the learned judge expressly declared that the creditor's suit created an equitable lien upon the property of the debtor. But he supposed that such

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a lien is not entitled to the same consideration under the statute of distributions, as a lien at law accompanied by possession.^(a)

Without discussing that position, it suffices to say that the Vice-Chancellor treated the creditor's right as being a *lien*. And in *Smith v. Bleecker*, decided by him since the causes before me were heard, (MS. May 27th, 1845,) he overruled a plea of a bankrupt's discharge and assignments, in a creditor's suit, where the petition in bankruptcy *preceded a few days, the filing of the bill*. I can only speak from a newspaper report of the decision. If that be correct, the V. C. held that the creditor acquired by his suit, a lien in equity which could not be divested by the subsequent decree in bankruptcy; and that the latter took effect from its entry, and not by relation from the time of filing the petition in bankruptcy.

In the United States courts within this state, we have conflicting decisions on the question.

In *Ex parte the General Assignee, In re Allen*, and several others, bankrupts, (reported in 1 N. Y. Legal Observer, 115, and 5 Law Reporter, 362,) Judge Conkling of the Northern District, decided that by the institution and diligent prosecution of a suit by a creditor's bill, the complainant acquired a lien on the debtor's property, which was not divested by a decree of bankruptcy entered on a petition filed after the commencement of such suit. The opinion of the learned district judge is familiar to the profession, and I need not say more of it than that it is distinguished by its directness and ability, and is to my mind conclusive.

On the other hand, Judge Betts of the Southern District, a jurist of more experience and certainly of no less learning than the other, and whose judgments have always commanded the entire respect and general assent of the bar, decided directly to the contrary, in *Ex parte Waddell the General Assignee, In re Coster*, (1 N. Y. Leg. Obs. 53.) The petition was filed by Coster after the commencement of the creditor's suit, but before the order for a receiver.

^(a) See on this point a similar decision, *Jones v. Smith*, (1 Walker's Ch. R. Michigan, 115.)

As I am constrained to differ from the judge of the Southern District, it is due to the high regard which I entertain for him, that I should say that I think his decision is made under an erroneous impression in respect of creditor's suits, which have grown up since he left the bar, and with which his judicial career has never brought him into direct contact.

Thus, although until the property of the debtor is discovered, the lien must, as he says, be apparently floating and in abeyance, it is in this respect no different from the lien of a judgment upon lands, or an execution upon goods, until such lands or goods are discovered. ~~It~~ like the latter when levied, and unlike the judgment, the lien by the creditor's suit becomes *specific*, upon such assets as are discovered. And again, unlike the general lien, it does not affect after acquired property.

The power to prevent a transfer of the property by the defendant, does not follow or depend upon the discovery of the property. In practice, it always precedes the defendant's appearance, the injunction being taken out with the *subpœna*; and its object is to prevent the defendant from disposing of the property and thereby defeating the lien. And lastly, although as the judge remarks, the fund is subjected by the court, to the *equitable rights of all parties*, yet it therein resembles every other fund which comes within the jurisdiction of the court; and as between different claimants by creditor's suits, is as we have seen, disposed of according to the priority of such suits as shown by the order in which they were commenced.

Thus it will be observed, that although our state courts have uniformly treated the rights in question as a *lien*, and that at all events, it must be deemed a *security*, yet we have no authoritative decision upon the point; and the learned judges of the U. S. District Court disagree in opinion.

The remedy against things in action by a suit in equity is not established in many of our sister states.

It prevails in Kentucky by force of several statutes, the first of which was passed in 1821, (1 Kentucky Dig. 505,) and I find a decision of the Court of Appeals in that state, which is directly in point.

In *Fetter v. Cirode*, (4 Ben Monroe's R. 482,) Cirode and

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others, about eighteen months before the passage of the bankrupt law, having several judgments against T. McGruder and others, filed their bill in chancery, to set aside as fraudulent, various conveyances and transfers made by the debtors, and to subject the property transferred and the proceeds of such of it as had been sold, to the payment of their demands. During the progress of the suit, which was vigorously prosecuted, T. McGruder was discharged from his debts, under the bankrupt law, and then set up his discharge in an amended plea and answer. The Court of Appeals, affirming the decision of the Chancellor, held that the effect of the discharge was to exonerate T. McGruder from a decree *in personam*, but that it did not discharge the property and things in action specifically sought to be subjected to the complainants demands, from liability to their suit. The court held that by the bill, the service of process and pendency of the suit, a lien attached in favor of the complainants, upon the effects sought to be subjected, which was not divested or ousted by the statute.

It should be remarked, that in *Newdigate v. Jacobs*, (9 Dana's R. 17,) the same court in 1839, declared that the commencement of the creditor's suit in equity, constituted a lien in his favor upon the debtor's effects subject to the operation of the suit.

A reference to analogous cases and decisions confirms my conclusion, that the receiver and not the general assignee, is entitled to the fund in question.

Many of these have arisen under the statute laws of various states, authorizing the issue of attachments, &c., as mesne process for the collection of debts.

In some of these statutes, the attachment is denominated a *lien*, while in others which give to it the same operation, the word *lien* is not used.

It appears to me that the use or omission of that word cannot be essential, and that the operation and effect of the process, is to determine whether it constitutes a lien or security.

In *Downer v. Brackett*, (5 Law Reporter, 392,) Judge Prentiss, in the U. S. District Court in Vermont, held that an attachment, commencing a suit for the recovery of a debt not in judgment, and which was levied on goods, was a lien within the provision of

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the bankrupt law. The judgments in that case, were confessed by the debtor before the petition in bankruptcy was filed. Nevertheless the argument of the learned judge, goes the whole length of holding that the attachment, irrespective of the judgment, constituted a lien.

In *Houghton v. Eustis*, (5 *ibid.* 505,) in the U. S. Circuit Court in the same district, the petition in bankruptcy intervened after the issuing and levying of the attachment and before the rendition of the judgment; and it was decided by the late Mr. Justice Thompson, that the attachment constituted a lien and security, within the meaning of the proviso in the second section of the bankrupt act. He says, the attachment by the laws of that state was a security upon the property attached, "a security valid as against the world, and indefeasible, excepting by the attaching creditor, up to the rendition of the judgment." "If he recover, the judgment must be satisfied, *pro tanto*, out of that property." In regard to the objection that the security upon the property attached is contingent, the judge says, it is no more contingent than a lien by mortgage. Liens are necessarily defeasible and thus contingent. When the right becomes absolute, it ceases to be a lien.

The two cases last cited, are entitled to the more weight, because the petitions in bankruptcy were presented by creditors, and an involuntary decree was made against the bankrupt in each case. It was the petitioning creditors there who urged the doctrine that "equality is equity;" not the debtor, who after driving his creditor to exhaust all remedies at law and to the extreme of filing a bill in equity, then files his voluntary petition in bankruptcy and seeks thereby to overreach the whole proceeding, and deprive the creditor of the fruits of his superior vigilance, and mulct him in the payment of the expenses which he has incurred.

In *the matter of Rowell*, (6 *Law Reporter*, 298, and 2 *N. Y. Leg. Obs.* 283,) and in *the Matter of Reed*, (3 *N. Y. Leg. Obs.* 262,) Judge Prentiss adhered to his opinion pronounced in *Donner v. Brackett*.

In *Kuttridge v. Warren*, (7 *Law Reporter*, 77,) the Supreme Court of New Hampshire in a very able judgment pronounced by Chief Justice Parker, decided that an attachment of property

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on mesne process, made in good faith, before any act of bankruptcy or petition by the debtor, is a lien or security upon property, valid by the laws of that state, and therefore within the proviso of the second section of the bankrupt act.

In *Kittredge v. Emerson*, (7 *ibid.* 312, and 3 N. Y. Leg. Obs. 166,) the same court reviewed its decision in *Kittredge* and *Warren*, and re-affirmed it. The argument of the Chief Justice in both cases, is marked by sound learning and close and logical reasoning. It not only fully sustains the ground which I have assumed in regard to creditor's suits, but goes far beyond it; for it sustains the suit by attachment, *in rem*, when it can no longer operate to effect a judgment *in personam*. In the creditor's suits, we set out with a judgment *in personam*. The attachments in New Hampshire were suits in assumpsit upon simple contract. A similar decision has been made in the U. S. District Court of Vermont. (See *In re Reed*, 3 N. Y. Leg. Obs. 264.)

In *Dudley's Case*, before the late Mr. Justice Baldwin, in the Circuit Court of the United States, in the Eastern District of Pennsylvania, October 31, 1832, (Penn. Law Journal, 302, 312, 315, 318,) after *Dudley* had presented his petition in bankruptcy and before a decree could be made, several executions were issued on judgments previously obtained, and were levied upon his property. The Circuit Court refused to interfere, and held that the property of the petitioner was not divested until a decree in bankruptcy has passed, and until then, is subject to execution. Judge Randall of the U. S. District Court in that District, had previously ruled the same in *Ex parte Bennet*, (Penn. Law Journal, 1845,) and his decision was confirmed in *Dudley's Case*. In the course of his decision, Judge Baldwin illustrates his position by reference to attachments on mesne process, which he considers as valid liens.

In the *American Exchange Bank v. Morris Canal Company*, (6 Hill's R. 366,) the Supreme Court held that in our proceeding by attachment against foreign corporations, the creditor has a lien on the property attached, from the time of its seizure, and not merely from the time of the recovery of the judgment.

The case of *Dove v. Dawson*, (6 Alabama Rep. N. S. 712,) was one where a promissory note was attached on a garnishee pro-

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cess. It was decided that the attachment was a lien upon the note, and held it as against a subsequent *bona fide* purchaser without notice of the attachment.

In *Kilborn v. Lyman*, (6 Metcalf, 299,) decided in May, 1844, the Supreme Court of Massachusetts declare that attachments in that state have been treated and considered as liens from a very early period; having attached to them their peculiar character of conditional liens, and liable to be defeated by various contingencies which may prevent any recovery of judgment or levy of execution. The court refers to its decision in the case of the *Receivers of the Phoenix Bank v. The Hamilton Bank*, (Suffolk, March Term, 1844,) no report of which has come under my observation.^(a)

From this decision and the long series of cases in Massachusetts in which the judges have treated their attachments as being a lien, I infer that the Supreme Court of that state will give to such lien the same effect, as has been done in New Hampshire and Vermont, whenever the question is presented between the attaching creditor and the assignee in bankruptcy.

I may add, that this inference is confirmed by a recent conversation on the subject with one of the learned judges of that court.

I come now to the authorities relied upon by the general assignee, in opposition to those upon which I have just commented.

The first in order is *Ex parte Foster*, (2 Story's R. 131, and 5 Law Reporter, 55, 69,) in the Circuit Court of the United States, in the Massachusetts District. The learned judge of that circuit states the point decided in that case, when commenting upon it in the *Matter of Cook*, (5 *ibid.* 444, and 2 Story, 376.) He held that an attachment under the Massachusetts laws, to recover a debt, was not while the suit was pending, an absolute lien such as is protected by the act of Congress, but is a contingent lien, dependent upon the creditor's obtaining judgment in the suit. That a bankrupt discharge obtained during the progress of the suit, might be pleaded in bar, and would if properly pleaded be a good

(a) Reported in 7 Metcalf, 340, *Hubbard v. Hamilton Bank*.

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bar, or defence upon the merits, to the suit, and would prevent the recovery of any judgment therein. And that after the presenting a petition in bankruptcy, he would, on the application of the petitioner or of any creditor, restrain the attaching creditor from proceeding, until it should be ascertained whether the debtor would be decreed a bankrupt and discharged or not.

After the decision in *Kittredge v. Warren*, by the Supreme Court of New Hampshire, Judge Story, when sitting in the U. S. Circuit in that state, re-affirmed this decision, in the *Matter of Bellows and Peck*, (7 Law Reporter, 119.)

Thus that most eminent judge is placed in direct collision with the Supreme Court of New Hampshire; and if both tribunals persist in executing their judgments, a conflict of their respective executive officers is inevitable.

The doctrine of Judge Story is contrary to the opinion of Judge Thompson which I have cited, and to the principles advanced by Judge Baldwin. It is also adverse to the decisions of the U. S. District Judges in Vermont, Connecticut, Northern New York and Eastern Pennsylvania.

But the profound jurist who presides in the First Circuit of the United States, is himself a judicial host; and I rejoice that I may say of the difference between him and his late illustrious compeers, as well as that with the New Hampshire courts, *non nobis, tantas componere lites*.

Notwithstanding the marked difference which I have pointed out, between the attachments on mesne process, and the suits in our courts of equity by judgment creditors; it is not to be denied that much of Judge Story's reasoning is adverse to the lien insisted upon in the latter suits.

Therefore, although I may perhaps rely on that difference, I feel bound to make some suggestions upon his decisions; which I nevertheless do with great diffidence.

The learned judge in the case of *Bellows and Peck*, (7 Law Reporter, 131,) finally avows that in his opinion the New Hampshire attachment is not a lien or security within the true intent of the proviso in the second section of the bankrupt act; and if it were, it is avoided by a decree and discharge in bankruptcy, when pleaded in the attachment suit. I will dismiss the

question of lien created by the service of the attachment, by saying that the weight of authority is decisive against Judge Story. And at all events, our creditor's suit constitutes a lien or security. The more important inquiry here is the effect upon such lien of the successful prosecution of the proceeding in bankruptcy.

Judge Story holds in effect that by the discharge of the bankrupt, the debt upon which the lien is founded, is gone. And as in his view, the attaching creditor in Massachusetts or New Hampshire, can never recover a judgment because of the discharge, so here it is urged that our judgment creditor is for the same cause prevented from obtaining a decree. The argument here is clearly fallacious, unless it be a settled rule that where one proceeds in equity *in rem* as well as *in personam*, he can have no relief against the former without he shows a right to relief against the person. A suit to foreclose a mortgage, exhibits its fallacy. In truth, our creditor's suit is purely a proceeding *in rem*. It is never brought to obtain a decree against the debtor for general payment; thus merely reiterating the judgment at law.

What effect then should be given to the discharge obtained pending a suit which is both *in rem* and *in personam*? Is the remedy against the property cut off, because the person and future effects are exonerated?

With deference, it seems to me that it is not.

In *Newton v. Scott*, (9 Mees. & Welsby, 434,) in replevin, the defendant justified under a distress for rent in arrear. It appeared that the rent was due before the bankruptcy of the tenant, and the distress was made after the bankruptcy but before the tenant obtained his certificate. In behalf of the owner of the goods, (which were seised on the demised premises but did not belong to the tenant,) it was contended that by the bankruptcy and certificate, the rent was no longer due from the tenant; he was discharged of the rent. And that the discharge was in the nature of a release. Therefore the defendant was not entitled to a return of the goods.

The court decided that the certificate did not operate as a release of the rent, and that the landlord was entitled to avow for a return of the goods distrained and replevied. Parke, Baron,

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said, "the only effect of the certificate is to discharge the person of the bankrupt and his (future) goods; the debt is not thereby released, or the landlord's remedy against collateral parties extinguished. All collateral securities remain in force notwithstanding the bankruptcy, and collateral remedies are not released."

"The distress gave the landlord no *lien*, because the goods are in the custody of the law; but he has a right to enforce the payment of the rent through the medium of the goods distrained, and as the rent is not released by the certificate, he still retains the right to work out the payment of it by means of those goods."

This case was affirmed in the Exchequer Chamber, (present, eight judges,) 10 M. & W. 471, on the same grounds.

Lord Denman in giving the judgment of the court, says that the certificate does not extinguish the debt, but only bars the remedy.

In *Bucham v. Creighton*, (10 Bing. 11,) previous to the above case, the Common Pleas had held that a discharge under the insolvent debtor's act must be *pleaded in assumpsit*, on the ground that it is a statutory answer to the plaintiff's demand; it does not destroy the debt, but merely the plaintiff's remedy against the person and future effects of his debtor.

In *Phillips v. Sherville*, Hil. Vac. 1845, (9 Lond. Jurist Rep. 179,) the Queen's Bench held the same point upon an insolvent discharge, and referring to *Newton v. Scott*, Lord Denman says there is in this respect a perfect analogy between a discharge under the bankrupt act and one under the insolvent act. And although upon the latter, the remedy by action was gone, that the rent itself was not extinguished and the right of distress remained.

Is it not the same in regard to a pending attachment? The bankrupt discharge although in terms it declares the debts to be discharged, does not *extinguish the debt*. It prevents the creditor from further pursuing the person or future acquisitions of the debtor; but it in no manner impairs any right or interest in property which he has already acquired. This is abundantly demonstrated by Judge Pentiss in the *Matter of Reed*, before cited.

Whether the forms of proceeding in attachment suits, enable

the creditor to take a judgment so qualified, I am ignorant except as the New Hampshire decisions inform me. There is certainly no difficulty in the way of entering a decree in this court, conformable to the principle just stated.

In *Smith v. Gordon*, (6 Law Reporter, 313,) Judge Ware of the U. S. District Court in Maine, held that a creditor who filed a bill to reach the effects of his debtor which had been fraudulently invested in land in the name of another, did not thereby acquire any such lien or right of priority against such effects as is protected by the proviso in the bankrupt law. Judge Ware deemed the right or privilege, analogous to that obtained by the levy of an attachment, which Judge Story had adjudged not to be within the saving of the act.

The case therefore adds the approval of the learned and much respected district judge, to the decision of Mr. Justice Story. From what I have said, as well as from Judge Ware's remarks, it will be seen that the courts in this state hold differently as to the nature of the lien acquired by such a bill in equity.

After a careful examination of the judgments to which I was referred in the First United States Circuit, I am unable to concur with Mr. Justice Story and Judge Ware, in their exposition of this portion of the bankrupt act. And I must say, with the most profound respect for those eminent jurists, that I think the decided weight of judicial reasoning and authority accords with the conclusion to which I was brought by my own careful and earnest consideration of the subject.

The right of the creditor in these bills was likened by the counsel for the assignee unto the priority which the United States have by law over other creditors for the payment of debts in certain cases.

But the comparison does not hold good. The act of Congress provides that debts due to the government in the cases specified *are to be first satisfied*, where there is a deficiency of assets. It creates no lien upon any specific property. (*United States v. Fisher*, 2 Cranch, 358; and see 2 Wheat. 396; 1 Peters, 39 and 441, 442.) It does not impede the sale or transfer by the debtor in ordinary business; nor does it even overrule his vol-

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untary assignment for the benefit of creditors. It is a mere right of prior payment out of the general funds of the debtor ; and when those funds are in the hands of his assignee, or of his legal representative, it is a right which the assignee or representative is bound to respect, at the peril of making himself personally responsible to the government. By a judgment, execution and levy it may become a lien upon specific property. If the right itself were a lien, the government could follow the property of the debtor when paid or disposed of to others, and reclaim it ; but no such remedy has ever been claimed in its behalf. So far from it, that when the question of priority arose upon an attachment levied on the debtor's personal property, before the United States issued a writ to compel payment of his bonds for duties ; the Supreme Court of the United States decided that the rights acquired by the attachment were paramount. (*Prince v. Bartlet*, 8 Cranch, 434 ; *Beaston v. Farmers Bank of Delaware*, 12 Peters, 135.)

The case of *Conard v. The Atlantic Insurance Company*, (1 Peters, 386,) illustrates the nature of the priority of the United States. This case and *Thelusson v. Smith*, (2 Wheat. 423,) were also cited as authorities against the existence of any lien by force of a creditor's suit ; and much stress was laid upon the language of the court relative to the right of a mortgagee, and the interest of a judgment creditor in lands bound by his judgment.

Referring to Judge Baldwin's perspicuous exposition of those cases in *Dudley's Case*, before cited, (Penn. Law Journ. 313, &c.) I need only say that the point decided in each, does not affect the question before me.

Other instances of a right to priority of payment were mentioned, to weaken the force of the lien claimed in behalf of the creditor's suit. Some of them are unquestionably liens or securities within the intendment of the bankrupt act. Such is a *lis pendens* affecting a specific chattel or parcel of land. Others are mere priorities for payment ; as a partnership debt to be paid out of partnership funds before separate debts ; and judgments to be paid before debts of a less degree, out of a decedent's estate, under our statutes of administration.

Where there is a lien, the specific property itself is affected and followed into the hands of whomsoever it may come to; while for a priority merely, if the property is disposed of without regarding such priority, the remedy is against the wrongful disposer, and not against the property itself.

My conclusion in the case of *De Kay*, is that *Chester & Co.* by the commencement and prosecution of their suit against *Glover* in this court, acquired a lien upon the debt due from *De Kay* to *Glover*, which was not divested or impaired by the subsequent proceedings in the bankruptcy of *Glover*.

The lien was acquired *by the commencement of the suit*, and not by the order for a receiver or his appointment.

In regard to chattels subject to execution, the lien may depend upon the receivership. As to that I give no opinion.

There is no dispute here as to the good faith of *Chester & Co.*, nor but that they prosecuted their suit with diligence.

Any collusion with the debtor would doubtless defeat the lien, and in analogy to dormant executions at law, it might perhaps be lost by unexplained delay, or neglect in prosecuting the suit.

The receiver must be declared entitled to the fund in the suit of *De Kay*.

In the case of *Storm and others v. The General Assignee*, the facts material to the present inquiry are these.

Davenport, the debtor of *Storm* and others, on the 9th of August, 1841, assigned a bond and mortgage to *Burke*, for the payment of certain preferred creditors. Subsequently, *Storm* and others recovered a judgment against *Davenport*, issued an execution which was returned unsatisfied, and on the 23d of September, 1842, filed their bill thereon in this court. They made *Burke* a party and sought to set aside the assignment to him as fraudulent against them. The subpoena to answer, and the usual injunction, were served on the same day the bill was filed. On the 9th of November, 1842, the customary order for a receiver was made. Prior to this, and in June 1842, a receiver of *Davenport's* effects had been appointed in another creditor's suit, and *Davenport* had assigned to him, pursuant to the order of the court in that suit. The same person was appointed receiver in

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the suit of Storm and others, (no other person was eligible by the practice of the courts,) but the latter appointment was made after February, 1843.

In October, 1843, the suit of Storm and others came to a hearing, and I decided that the assignment to Burke was fraudulent as against them.^(a) The suit was however directed to stand over in order to make the general assignee a party: While the original suit was pending, and on the 24th of January, 1843, Davenport filed his petition for a discharge under the bankrupt act, and he was decreed a bankrupt on the 25th day of February following.

It is contended by the general assignee, that the assignment by Davenport to Burke was a fraud upon the bankrupt act, and void as against the assignee, who by virtue of the decree in bankruptcy, is entitled to claim and receive the mortgage as a part of Davenport's assets.

He also insists that the decree took effect by relation from the time of filing the petition in bankruptcy; but that point is not material in this suit.

The fraudulent assignment was made before the bankrupt act passed. It can scarcely be said to have been a fraud upon a statute not then in being. It was more properly a fraud upon our statute against fraudulent sales and conveyances, and any judgment and execution creditor was at liberty to avoid it for that cause.

Waiving this consideration for the present, was the assignment affected by the bankrupt act?

The second section declares that *future* transfers, &c., in contemplation of bankruptcy, &c., shall be deemed a fraud on the act, and void. This transfer was a transaction passed; it was not future, whether the act be deemed to speak from its passage, or from the time it went into effect.

After the second proviso in the same section, it is enacted that no bankrupt shall be discharged on his voluntary petition, who has made an assignment after the 1st of January, 1841, in con-

(a) Reported, ante, Vol. I., page 135.

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temptation of the passage of the act, by which preferences are given.

This is similar to the provision in our state insolvent laws, and is to be construed in the same manner. It does not avoid or affect the assignment, although it precludes the assignor from availing himself of the benefit of the insolvent laws.

But if I am wrong in this, and the effect of the clause is to render the assignment of Davenport void; yet the very next sentence is the proviso which has engaged my attention in De Kay's case, and which declares that nothing in the act contained shall impair any liens, or securities, &c., valid by the state law, and not inconsistent with the second or fifth sections of the act.

In this case, before any proceeding was had in bankruptcy, Storm and others had obtained a lien upon the mortgage which is directly within that proviso.

The good sense of the matter in my view is this.

The bankrupt, before the act passed, made a transfer which was fraudulent as against creditors. But until some creditor proceeded in equity to avoid it, it was operative, and transferred the mortgage in question. It was voidable in respect of Storm and others, and subsequently became voidable by the general assignee. By our law, the first creditor who assailed it in due form, would obtain a lien upon it, and a priority over other creditors.

Storm and others were the first who proceeded against it, and they acquired such a lien and priority over all the other creditors, before the general assignee had any rights; and indeed before there was any proceeding in bankruptcy taken, or (so far as appears,) contemplated. Although the general assignee, upon the decree in bankruptcy became the representative of all the creditors and entitled to assail the assignment, yet he could not on filing a bill, assert any other or greater rights, than all the creditors could for whom he was a representative. And all the other creditors combined, could not overreach or impair the prior right of Storm and others obtained by the commencement of their suit.

If the property assigned to Burke had been merchandize, and Storm and others had levied upon it by virtue of their execution before the petition in bankruptcy was presented, their lien would

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have prevailed indisputably, over the title of the general assignee. The commencement of the creditor's suit gave them an equitable lien upon the mortgage in question, which is as efficacious as the levy of an execution upon merchandize, and in my judgment equally within the saving of the bankrupt act.

If the assignee were to be entitled to a preference over Storm and others under these circumstances, it would present this singular anomaly, that no creditor could file a bill to avoid a transfer palpably fraudulent, without incurring the risk of losing all his trouble and expenses after an angry contest, by the fraudulent debtor's voluntarily going into bankruptcy.

I do not think that the true construction of the act of Congress leads to any such result; and I have no doubt but that Storm and others are entitled to the priority which they clearly had at the commencement of their suit.

The funds in these cases, are in the custody of the officers of this court, and as I entertain no doubt in regard to the right of the complainants in the creditors suits, I will make the usual decree for their payment. Whenever a proper case arises, I trust to be found emulating the lofty tone and the generous confidence, exhibited by the able judge of the Southern District Court, in the case before cited. (*In re Coster*, 1 N. Y. Leg. Obs. 58.)

Decree accordingly, in both suits.

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When the person to whom a remainder after a life estate is limited, is ascertained, and the event upon which it is to take effect is certain to happen; it is a vested remainder, although by its terms it may be entirely defeated by the death of such person, before the termination of the particular estate.

It is the uncertainty of the *right* of enjoyment, which renders a remainder contingent; not the uncertainty of its actual enjoyment.

The present capacity of taking effect in possession, if the possession were to become vacant, distinguishes a vested from a contingent remainder; not the certainty that the possession ever will become vacant while the remainder continues.

A testatrix devised real estate to three trustees in fee, in trust to receive the rents, issues and profits thereof, and pay the same to her grandson during his natural life; and from and after his death, in further trust to convey the same to his lawful issue living at his death in fee; and if he should not leave any lawful issue at the time of his death, then in further trust to convey the same to another grandson of the testatrix in fee, or to such person in fee as he might by will appoint, if he died prior to the tenant for life: *Held*, that the children of the tenant for life, (all of whom were born after the death of the testatrix,) took vested equitable remainders in fee in the real estate, as they were born respectively; which remainders were liable to be divested as to each on his or her dying during the lifetime of their father, and were subject to open to let in the after born children of the tenant for life.

Under such a devise, no conveyance of the legal title by the trustees is now necessary in order to vest the whole estate in the children at the determination of the particular estate.

In a suit to foreclose the equity of redemption in lands mortgaged and to sell the lands, all persons having an interest in the equity of redemption should be made parties.

This was held of persons having a vested equitable remainder in fee in the equity of redemption, and that their rights were not affected or impaired by a decree of foreclosure and sale in a suit to which they were not parties, although the trustee vested with the legal title was made a defendant.

The fact that the trustee executed the mortgage of the estate under the authority of the court of chancery, and with the sanction and joint execution of a master of the court, as prescribed in the order; was held not to excuse the omission to make the remaindermen parties.

As a general rule, cestuis que trust must be made parties, where the equity of redemption is vested in a trustee for their benefit. But where there are remote trust limitations, it suffices to bring before the court the beneficiaries *in esse*, who have the first estate of inheritance, together with those having the precedent estates and prior interests, and the trustee.

An order upon a purchaser under a decree of foreclosure to complete the sale, made

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on a specific objection taken to the title ; does not decide a question of title or of parties, which was not made the ground of objection, or brought to the consideration of the court. And such order is not a protection to the purchaser, against persons having vested interests in the equity of redemption ; who ought to have been, but were not, made parties to the foreclosure.

Chancery will not compel a purchaser in good faith under its decree, to take a defective title, where the defect is brought to its notice ; but it does not undertake that none but good titles shall be sold under its directions.

Under an order of the court of chancery, authorizing a trustee to execute mortgages on lands, in which he has a life estate, and his children an estate in fee, to secure monies already advanced to him and debts owing by him, as also monies to be advanced or lent to him ; and authorizing him, amongst other things, to apply the monies to the payment of his debts, and invest the surplus so as to yield an income for the support of his family ; it was *held*, that he could not execute a mortgage for clothing thereafter to be furnished for himself or his children, nor upon a verbal or written agreement to advance money at a future day.

In general, no statute is to have a retrospect beyond the time of its commencement.

And a new statute of limitations, should not be so construed as to cut off or abridge a vested right, unless its language imperatively requires that construction. The provision of the revised statutes, prescribing a limitation of ten years to suits of exclusive equitable cognizance, does not apply to a right which was vested and perfect before those statutes took effect.

March 11, 12, 13 ; July 21, 1845.

THE bill in this cause was filed on the tenth day of July 1842, by Charles A. Williamson and Catharine H. his wife, Rupert J. Cochran and Isabella M. his wife, and Bayard Clarke ; (the latter, with the two married women, being the only children of Thomas B. Clarke, formerly of the city of New York, deceased, who survived their father ;) against Hickson W. Field and John M. Bradhurst, the sole acting executors and trustees of the last will and testament of Moses Field, late of the same city, deceased ; and against his seven infant children who were his devisees and legatees, as well as his heirs at law.

The object of the suit was to have a re-conveyance of the title of the store and lot known as number 257 Broadway in that city, which Moses Field claimed in fee at his death ; and also an account of the rents and profits of the property, during the time it was possessed by him and the trustees under his will. The pleadings and testimony presented also several different and important questions upon the validity and effect of certain statutes authorizing Thomas B. Clarke to sell and mortgage the real

estate to which his children were presumptively entitled after his death, and of the orders of the Court of Chancery founded upon those statutes; which are not discussed in the judgment pronounced by the court.

The facts upon which the decision was made, were the following:

Mrs. Mary Clarke, the widow of Thomas Clarke, at the time of her death in July, 1802, was seised in fee simple of the lot in question, as well as of other real estate to a large amount. By her last will and testament, dated April 6th, 1802, and duly executed, she made the following devise:

"Item, I give and devise unto the said Benjamin Moore and Charity his wife and to Elizabeth Maunsell and their heirs forever, as joint tenants and not as tenants in common, all that certain lot of land number eight in the said thirteenth allotment of the said patent, containing one hundred acres: also all that part of my said farm at Greenwich aforesaid, called Chelsea, lying to the northward of the line hereinbefore directed to be drawn from the Greenwich road to the Hudson River twelve feet to the northward of the fence standing behind the house now occupied by John Hall, bounded southerly by the said line, northerly by the land of Cornelius Ray, easterly by the Greenwich road, and westerly by the Hudson, including that part of my said farm now under lease to Robert Lenox; also all my house and lot with the appurtenances known by number seven within the limits of the prison and now occupied by Thomas Byron; to have and to hold the said hereby devised premises to the said Benjamin Moore and Charity his wife and Elizabeth Maunsell, and to the survivor or survivors of them and the heirs of such survivor, as joint tenants and not as tenants in common, in trust to receive the rents, issues and profits thereof, and to pay the same to the said Thomas B. Clarke, natural son of my late son Clement, during his natural life and from and after the death of the said Thomas B. Clarke, in further trust to convey the same to the lawful issue of the said Thomas B. Clarke living at his death in fee, and if the said Thomas B. Clarke shall not leave any lawful issue at the time of his death, then in the further trust and confidence to convey the said hereby devised premises to my said grandson Clement C.

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Moore, and to his heirs or to such person in fee as he may by will appoint in case of his death prior to the death of the said Thomas B. Clarke."

The house and lot described in the will as number seven within the limits of the prison, are the premises on Broadway respecting which the suit was brought; and were known as lot No. 320, on the map of the Church Farm, so called, belonging to the corporation of Trinity Church.

In January, 1805, Thomas B. Clarke obtained from the trustees named in the will, a power of attorney, authorizing him to demise the trust lands for terms not exceeding twenty-one years. On the 30th of September, 1808, he procured two of the trustees, Mr. and Mrs. Moore, to give him another power of like import, and containing authority to sell and assign his own interest in the property, with the right to the rents. On the 30th of July, 1810, T. B. Clarke under one or both of these letters of attorney, leased the Broadway lot in the names of Mr. and Mrs. Moore as trustees, to George Sinclair, for ten years from May 1, 1810, at the annual rent of \$450.

The power of demising under the will being too limited, T. B. Clarke filed a bill in the Court of Chancery against the trustees of the will, and Clement C. Moore, together with his six children then living, (all of whom were infants, and all but Catharine and Isabella afterwards died in his lifetime;) for the purpose of obtaining a more enlarged authority in respect of leases. A decree was made in that suit, on the 22d of February, 1813, authorizing the trustees, with the assent of T. B. Clarke, to lease any of the premises devised to them in trust, for a term or terms not exceeding twenty-one years; the whole consideration to be reserved in yearly rents payable to the trustees.

On the 8th of March, 1813, T. B. Clarke as the attorney of the two trustees Mr. and Mrs. Moore, (the third trustee Mrs. Maunsell being still alive,) executed another lease of the Broadway lot to Sinclair, for fourteen years from the first day of May, 1820, at the same rent of \$450 yearly. This lease purported to be given under the order of the court. T. B. Clarke thereupon for \$950 paid to him by Sinclair, released the rents reserved by the lease.

In January, 1814, he procured the trustees to consent to the

substitution of another trustee in their stead; and he then obtained the passage of an act of the legislature, on the 1st of April, 1814, entitled "An act for the relief of Thomas B. Clarke," by which, amongst other things, the Court of Chancery was authorized to appoint one or more trustees of the property devised by Mary Clarke as before stated; the Chelsea farm was to be by them divided into two equal parts, one of which they were to retain upon the trusts of the will, and the other was to be laid out into lots for sale; and they were authorized and required to sell the latter half and also the Broadway lot, as soon as they conveniently could. There were various provisions in the act for the investment of the proceeds and the disposal of the income.

Nothing was done under this act, and in 1815, T. B. Clarke again petitioned the legislature, representing that Clement C. Moore had released to him his contingent remainder in the trust property, and that he had been unable to procure any person to undertake the duties of trustee. Mr. Moore's grant and release to T. B. Clarke was duly executed on the 21st day of February, 1815.

Upon this "an act supplemental" to the previous act was passed on the 24th of March, 1815, declaring that Mr. Moore's interest was vested in T. B. Clarke, and dispensing with the substitution of new trustees. The act authorized T. B. Clarke to execute and perform every act and duty in regard to the trust estate, that could be performed by the trustees; but no sale was to be made by him until he should have procured the Chancellor's assent.

T. B. Clarke thereupon presented a petition to the Chancellor, upon which and a master's report, an order of the court was made, dated July 3, 1815, giving the Chancellor's assent to the sale by T. B. Clarke of the east half of the Chelsea farm, and the Broadway lot; the sales to be made under the direction of a master. Out of the proceeds, he was authorized under the master's direction, to pay for debts due and to be contracted, for the necessary purposes of his family.

In 1816, he again applied to the legislature, and obtained the passage of an act on the 29th of March, 1816, entitled as "An act farther supplemental," &c., by which he was authorized to

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mortgage the lands previously authorized to be sold, and to apply the money raised by mortgage or sale, to the purposes required or to be required by the Chancellor under the several acts theretofore passed. A petition to the Chancellor ensued, which was referred to a master, and on the petition and master's report, an order was made by the court on the 1st of November, as of the 30th of May, 1816, the directing part of which is in these words:

"And on motion of Mr. Samuel Jones, Jr., of counsel for the petitioner, it is ordered, that the said petitioner, under the act entitled, an act further supplemental to the act entitled, 'an act for the relief of Thomas B. Clarke, passed March the twenty-ninth, one thousand eight hundred and sixteen, be, and he is hereby authorized, so far as the assent or act of this court is requisite, to mortgage instead of selling the lands and premises he was authorized to sell in and by the aforesaid order of this court, of the date of the third day of July last, or any part or parts thereof, and for that purpose to execute and give to the president and directors of the Manhattan Company, or other mortgagee or mortgagees, a mortgage or mortgages in fee of and upon the said lands and premises, or any part thereof remaining unsold, for securing the sum or sums of money to be advanced or lent to the petitioner or for his use, by the president and directors of the Manhattan Company aforesaid, or other mortgagee or mortgagees, and such debt or debts as may be already owing by him to such lender or lenders, with lawful interest therefor; and it is further ordered, that the monies to be procured and the debts to be extinguished by such mortgage or mortgages, be appropriated and adjusted in the same manner and under the same checks and not otherwise, than is provided for in and by the said before mentioned order of this court, and that the said before mentioned order of this court shall apply to and govern the application of monies to be raised by mortgage equally as if the same had been raised by a sale of all or any of the said lands and premises authorized in and by the said order to be sold; and further, that any party interested or to become interested therein, have liberty to apply to this court at any time or times hereafter, for any further or other orders and directions in or touching the premises."

On the 15th of March, 1817, another order was made by the

court, founded upon a petition of T. B. Clarke and a master's report; by which he was authorized to sell and dispose of the south half, instead of the east half, of the Chelsea property, together with the Broadway lot; and to mortgage all or any part or parts of such southern moiety; also to convey any of the same moiety in payment of his debts then owing; all to be done with the approval of a master. It was also ordered that he might take the monies arising from the premises, and apply the same in payment of his debts, and invest the surplus in such manner as he might deem proper to yield an income for the support of his family.

These documents were very voluminous, and no more of any of them has been stated, than was deemed indispensable to an understanding of the points decided.

On the 25th of January, 1817, by virtue of executions issued on judgments docketed against T. B. Clarke in 1814 and 1815, the sheriff sold his right, title and interest in and to the lot in question, to John Wallis and Henry Simmons, each being a plaintiff in one of the judgments. At the request of Clarke, they conveyed the lot on the 19th of April, 1817, to James A. Hamilton, for his benefit.

On the 16th of October, 1818, T. B. Clarke, describing himself as one of the devisees of Mrs. Mary Clarke, and Mr. Hamilton as a master in chancery and as trustee for T. B. Clarke, executed a mortgage of the Broadway lot to Jonas Mapes and James Oakley, to secure the payment of \$1000 with interest in one year, according to T. B. Clarke's bond of the same date to Mapes and Oakley. The mortgage recited Mrs. Clarke's devise in trust, and that by virtue of divers acts of the legislature and orders of the Court of Chancery, T. B. Clarke, with the assent of a master in chancery, was authorized to mortgage the premises. Mr. Hamilton's approval as master, was indorsed upon the mortgage.

On the next day, a like mortgage in every respect, on the same lot, was executed by T. B. Clarke and Mr. Hamilton to David S. Kennedy, to secure Clarke's bond for \$3500, with interest, payable in one year from its date. This mortgage was approved in like manner by Mr. Hamilton as master.

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The consideration of the bond and mortgage to Mapes and Oakley, is examined in detail in the opinion of the court. It suffices here to state, that it was for their account against Clarke as his tailors, including some clothing for his children; for money lent to him in small sums; and for clothing, money and their note, furnished to him the fall and winter after the securities were given. The evidence respecting the consideration of the mortgage to Mr. Kennedy was not distinct. It appeared that he received it for a debt, or part of a debt, due to him from a firm styled Bleecker & Lefferts, and that T. B. Clarke had some transactions with that firm which induced him to execute the mortgage. In Mr. Kennedy's answer to the foreclosure bill presently mentioned, he stated that Clarke owed the amount to Bleecker and Lefferts for money lent.

In the latter part of the year 1819, Mapes and Oakley filed their bill in the Court of Chancery to foreclose the mortgage executed to them by T. B. Clarke and Mr. Hamilton. They stated the indebtedness of Clarke to them, (as is fully noticed in the opinion of the court,) and the defendants named in their bill were T. B. Clarke and Messrs. Hamilton and Kennedy. At that time Clarke had children living, viz. the three who are complainants in this suit, and Clement who was his eldest child, and who was then under age, and who died in 1822 or 1823, during the life of his father.

Mr. Kennedy answered the bill, setting up his junior mortgage, and Mr. Hamilton answered claiming the surplus, if any there should be, as the trustee of T. B. Clarke. The latter did not enter his appearance in the suit.

On the 24th of January, 1820, a decree of foreclosure and sale was entered in Mapes and Oakley's suit which recited the report of a master finding the whole amount of the respective mortgages to be due to the complainants and to Mr. Kennedy. It also recited that the cause was heard on the consent of the defendant's solicitors and their waiver of notice of hearing. The decree directed the payment, first of the costs of all the parties, next the debt to Mapes and Oakley, then the debt to Mr. Kennedy, and the residue of the proceeds, if any, to Mr. Hamilton as trustee for the benefit of T. B. Clarke.

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The lot in Broadway was sold by a master of the court under this decree, on the 8th day of March, 1820, to Moses Field, for \$4050. At that time it was still in the occupation of Sinclair under his lease, who claimed the right to hold it till May 1, 1834, and that the rent was discharged. The master at the sale, announced the existence of the leases, and that the sale would be subject to the same. The lot in fee in possession, was worth about \$9000 at the time of the sale.

The counsel of Mr. Field suggested doubts as to the authority of T. B. Clarke to execute a mortgage of the premises, and he declined to complete his purchase. The master conducting the sale, thereupon made a special report to the court dated March 31st, 1820, setting forth the sale and that Mr. Field refused to accept a deed and pay his bid, because he was advised that T. B. Clarke was not authorized to mortgage the lot in Broadway, and therefore the title under the sale would not be good; but whenever the court should decree that he had a right to mortgage the lot, and that a sale under the decree would give a good and valid title to Mr. Field, he was ready and willing to complete his purchase. With this report a written stipulation was laid before the chancellor, signed by the solicitors for Mapes and Oakley and Mr. Field, to the effect that the question as to the validity of the title to the premises should be submitted to the Chancellor, with a question as to interest on the bid. Upon these papers the Chancellor made an order in the suit dated April 4th, 1820, reciting the submission of the question on the master's report by the respective solicitors, and ordering Mr. Field to perfect his purchase and accept a deed of the lot. Mr. Field accordingly paid the amount of his bid, and received a master's deed of the Broadway lot, bearing date March 8th, 1820. This deed recited or referred to the will of Mary Clarke, and the several acts of the legislature and orders founded thereon which have been heretofore mentioned. The proceeds of the sale were applied as directed in the decree.

Soon after he received his deed from the master, Mr. Field commenced an action of ejectment in the Supreme Court against Sinclair, to recover the possession of the lot in question, on the ground that his leases were invalid, and after a long and expensive litigation, in the course of which Sinclair removed the cause

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to the court of last resort, Mr. Field finally recovered the premises; and he was put into actual possession on the 19th of April, 1827. See the ejectment suit reported, *Sinclair v. Jackson, ex dem. Field*, (8 Cowen's R. 543,) on its decision in the Court for the Correction of Errors.

Within a year or two after obtaining the possession, Mr. Field removed the old buildings, and erected on the lot a very large and valuable store, at an expense of \$12,000 to \$15,000, which rented for from \$3000 to \$3300 annually from 1830, to the hearing of the cause; at which time the property in fee was estimated to be worth from \$35,000 to \$40,000.

Mr. Field died in November, 1833, having devised all his real and personal estate to his executors, in trust, to receive the rents, income and profits, and to dispose of the whole as therein expressed. His seven children were his principal devisees and legatees under the will, and they were all infants when the answers were put in in this cause. Mr. Field, and his executors after his death, received the rents and profits of the Broadway lot, from the time of his entry, until the hearing of the cause.

T. B. Clarke died intestate on the first day of May, 1826, and his only children who survived him, were the three named as complainants. All his children who died before him, were intestate and left no issue.

Of his surviving children, Catharine became of age on the 5th of June, 1828, and her marriage with Mr. Williamson took place May 10th, 1827. Isabella became twenty-one years of age on the 11th of June, 1830, and she was married after that event to Mr. Cochran. Bayard Clarke attained his majority, on the 17th of March, 1836.

The bill charged that the mortgages to Mapes and Oakley and to Kennedy, were not conformable to the acts of the legislature or to the orders of the court, and were void; and that Mr. Field by the recitals in his deed had constructive if not actual notice thereof.

That the decree of foreclosure and sale had no force or effect whatever upon the complainant's right and title in the lot in question; and that Field was cognizant of the wrongful acts of T. B. Clarke in the premises.

The bill prayed for an account of the rents and profits of the lot, and after discharging all just allowances and what if anything was justly chargeable on the two mortgages, for payment of the balance. And for leave to redeem, if the rents proved to be insufficient; and for a surrender and conveyance of the lot to the complainants; and for general relief.

The infant defendants put in a general answer by their guardian *ad litem*. The executors of Mr. Field answered at large. They insisted on the validity of the mortgages and of the regularity of the foreclosure and sale. That Field had no notice of any of the frauds and irregularities and defects charged in the bill. That he was a purchaser in good faith without notice, for a valuable consideration fully paid. That he purchased under a decree of the Court of Chancery, and was compelled to take the title by a special order of the court adjudging it to be a valid title. And that his possession and that of his executors had been adverse to the complainants from its commencement. All these matters were insisted upon as a bar to the suit. The executors also insisted upon the lapse of time as a bar, and also set up the ten years limitation of suits in equity, contained in the revised statutes. Also that there could be no partial redemption; and that all the complainants except Bayard Clarke, were barred by lapse of time and the statute. They denied their liability to account at all for the rents and profits, and insisted that in no event ought they to account for more than six years preceding the commencement of the suit.

The cause was heard on the pleadings, proofs and documentary evidence.

David Dudley Field, for the complainants.

John Jay and *George Wood*, for the defendants.

Mr. Field, made the following points.

I. The complainants are entitled to come into this court for relief, either as persons interested in the subject of the orders heretofore made in this court, or as the owners of the equity of redemption of the mortgaged premises. (1 Hoff. Ch. Pr. 420; 6

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Madd. 28; Mitford's Pl. 93, 92 and notes; 1 Barb. Ch. Pr. 334; 2 *ibid.* 211.)

II. The mortgages to Mapes and Oakley and to Kennedy were invalid for the following reasons:

1. The acts of the legislature under which they were given were unconstitutional. (*Jones v. Perry*, 10 Yerger, 59; *Taylor v. Porter*, 4 Hill, 140.)

2. The orders of the Court of Chancery were not in conformity to the acts. (*Cochran v. Van Surley*, 15 Wend. 442, 444 to 446; S. C. 20 Wend. 373, 374, 378; 3 Atk. 712; 2 J. C. R. 246, 400; *Bloom v. Burdick*, 1 Hill, 130; *Waldron v. Macomb*, *ibid.* 111.)

3. The mortgages were not in pursuance of the orders. (*Cochran v. Van Surley*, 20 Wend. 387, per Verplanck, Senator.)

III. If the mortgages were not actually null and void, they were so far an abuse of the authority of the court and subversive of the complainants rights, that this court will now review the whole transaction, and will restore the property to the complainants on payment to the defendants of what their ancestor paid with interest. (Verplanck, Senator, in 20 Wend. 386; *Gifford v. Hart*, 1 Sch. & Lef. 386; Cruise's Digest, tit. 33, § 49 and 53.)

IV. If the mortgage was valid, the complainants not being parties to the foreclosure, are not foreclosed, and may now redeem, in the common course. (Story's Eq. Pl. 176, 182, 187; Calvert on Parties, 181; *Calverley v. Phelps*, 6 Madd. 229; *Wilton v. Jones*, 2 Y. & Coll. New Cases, 224; *Helm v. Hardy*, 2 B. Monroe's R. 232; *Eagle Ins. Co. v. Campbell*, 2 Edw. 127; *Kortright v. Smith*, 3 Edw. 402; *Rogers v. Rogers*, 3 Paige, 379; *Nodine v. Greenfield*, 7 *ibid.* 544.)

V. The complainants have not lost their rights by time.

1. They are in time at any period within twenty years after Field got possession, which was in 1827.

2. The revised statutes do not apply to this case, their rights having accrued previously.

3. If the revised statutes did apply, twenty years would still be the limitation because the remedies are concurrent at law and in equity.

4. If the remedies were not concurrent, and the limitation were ten years, the bill was in time, because the youngest child became of age in 1836, and the statute did not begin to run till all came of age.

5. Even if it were otherwise, and the statute began to run against each as he became of age, the youngest is in time, and may redeem the whole property.

(Under the fifth general point, the counsel referred to 2 R. S. 301, 302, § 52; *Blanch. on Lim.* 65 to 67; *Moore v. Cable*, 1 J. C. R. 385; *Blake v. Foster*, 2 Ball & B. 387; *Burke v. Lynch*, 2 *ibid.* 426; *Dash v. Van Kleeck*, 7 Johns. R. 493; *Sackett v. Andross*, 5 Hill, 334, per Bronson, J.; *Van Hook v. Whitlock*, 3 Paige, 409; *Henry v. Stone*, 3 Beavan, 355; *Calv. on Parties*, 11, and note 3; *Morse v. Hovey*, 9 Paige, 167; *Brinckerhoff v. Lansing*, 4 J. C. R. 65; *Western Ins. Co. v. Eagle Fire Co.* 1 Paige, 284; *Mitf. Pl.* 179, 180; *Davies v. Quarterman*, 4 Y. & Coll. 257.)

Mr. Jay, for the defendants, made the following points:

I. The decree in the suit on the mortgage was binding upon the children of Clarke, and barred their rights in the equity of redemption, they being foreclosed thereby.

1. Clarke held the entire legal and equitable estate in fee in himself for his own benefit, in respect to his estate for life and his contingent remainder in fee, and for the benefit of the children to the extent of their contingent possibility in fee.

2. The children had no estate either legal or equitable, vested or contingent, but only a possibility, the whole legal and equitable estate being in Clarke the assignee of the trustees.

3. Clarke as the father and natural guardian, and as special guardian under the statute under the special supervision of the Chancellor, had such a management and direction of the rights of the children as sufficiently to represent them in equity, where parties may be dispensed with if convenient or unnecessary to produce them, and especially in a suit where the special rights and equities of the trustee and minors are not brought in question.

II. The acts of the legislature in question were constitutional

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and valid, being designed to apply the contingent rights of the infants to their maintenance and support. (*Cochran v. Van Sur- lay*, 20 Wend. 365.)

III. The orders in chancery under which the mortgages were given, were in substantial conformity with the acts. (20 Wend. 375, 378, per Chancellor.)

IV. There being no collusion proved between Field, the purchaser, and the parties to the foreclosure suit, the court will not inquire collaterally into the merits of that suit, or of the mortgages on which it was founded. (20 Wend. 385, per Verplanck, Senator; 2 Story's Eq. Jurisp. § 1124, 1125; Mitf. Pl. 163; Calv. on Part. 19, 20; *Drew v. Hardy*, 5 Price, 319; 4 Kent Comm. 186; Story Eq. Pl. 88; *Dayell v. Champness*, 1 Eq. Ca. Abr. 400, pl. 4; 3 Madd. 245; 1 Barb. Ch. Pr. 85; 2 Paige, 304, 305; 20 Wend. 387; 2 Story's Eq. Jur. § 1718; *Doe v. Provest*, 4 Johns. R. 65; Dougl. R. 776; 1 Cruise's Dig. 503, tit. 12, ch. 2, § 31; *Stanley v. James*, 16 Wend. 238, 239; 1 Preston on Abstr. 75, 76, 77.)

V. If there had been any misapplication of the funds raised by the mortgages, or of such parts of them as sprung out of the contingent rights of the infants and were applicable to their maintenance, the purchaser under the decree is protected against it, and this court, in the absence of fraud and collusion on the part of the purchaser, will not look behind the decree.

VI. If the court could look behind the decree as between other parties, it will not as against Field and those claiming under him, as a purchaser for a valuable consideration without notice.

VII. Two of the children are barred by the statute of limitation prescribed in the revised statutes which is prospective and applies to their case.

VIII. In respect to the other child, the statute runs, except as to his part as tenant in common.

Mr. Wood, referred to the following authorities :

As to the power of the court under the acts of the legislature, (20 Wend. 374, 378.) That the children of T. B. Clarke had only a possibility, during his life, and not a vested interest or right; 1 Preston on Estates, 76; *Lampet's Case*, (10 Coke,

46;) *Pelletreau v. Jackson*, (11 Wend. 120; and 2 Maule & S. 165, there cited;) *Moore v. Lyons*, (25 Wend. 119.) On the question of parties in the foreclosure suit, *Nodine v. Greenfield*, (7 Paige, 548;) *Yeates v. Hamblin*, (2 Atk. 237, 238;) Story's Eq. Pl. § 108, 110, 170, 227; 2 Story's Eq. Jur. § 1067; *Well-beloned v. Jones*, (1 Sim. & St. 43;) and the decree and order to complete the sale in the foreclosure suit. On the lapse of time and the statute of limitations, 2 R. S. 301, 302, § 52; *Ogden v. Astor*, (MS. case before V. C. McCoun;) and as to cumulative disabilities, *Bradstreet v. Clark*, (12 Wend. 676;) *Jackson v. Johnson*, (5 Cowen, 74;) *Demarest v. Wynkoop*, (3 J. C. R. 136.)

Mr. Field, in reply, referred to *Watson v. Spence*, (20 Wend. 260;) Cruise's Digest, title 16, chap. 1, § 35, 36, 41, and Fearn, there cited; *Jackson v. Waldron*, (13 Wend. 178, 195;) *Moore v. Lyons*, (25 *ibid.* 119;) *Doe v. Noel*, (1 Maule & S. 327;) Story's Eq. Pl. 193, 197, 207, 209; Lewin on Trusts, 610; 2 Story's Eq. Jur. § 1254 to 1266, 1124 to 1135; *Haynes v. Beach*, (3 J. C. R. 459.)

THE ASSISTANT VICE-CHANCELLOR.—There is no doubt but that the decree of this court upon the foreclosure of the mortgage of Mapes and Oakley, is final and conclusive upon the complainants, not only as to the validity of that mortgage, but as to their right to redeem the lands in question, if they were properly represented in the foreclosure suit.

They were all in being before that mortgage was executed, but neither of them was made a party defendant in the suit; and Clement the eldest child of Thomas B. Clarke, who survived till after the sale under the mortgage, was also omitted in the proceedings for its foreclosure.

It is contended by the defendants, that it was unnecessary to make the children of Thomas B. Clarke who were then *in esse*, parties to the suit upon Mapes and Oakley's mortgage, for two reasons. *First*, because at that time the children had *no estate or interest* in the lands, either legal or equitable, vested or contingent. They had a mere *possibility*, to the effect that if they

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should survive their father, they might become entitled to the property in common with all his surviving issue.

S:cond. If the children had an interest, they were sufficiently represented in the suit by their father, who was their trustee and clothed with the legal title, and who was in effect their special guardian, under the statutes and the orders of this court providing for the disposition of the property.

On the other hand, the complainants insist that the children of Clarke, as they were respectively born, took vested remainders in fee, and were indispensable parties to any suit which sought to cut off their equity of redemption or affect their rights in the mortgaged premises.

Before entering upon the consideration of these vital questions, I will advert to the defendants claim that they were before the Chancellor and were decided by him in the foreclosure suit and upon the motion to compel Mr. Field to complete his purchase made at the master's sale. The decree itself certainly furnishes no ground for this claim. Clarke suffered the bill to be taken as confessed, and the decree was taken *ex parte* against the other defendants, whose solicitor waived notice of hearing. The court did nothing farther than to direct such a decree to be entered as the bill of complaint called for. No legal point or position was presented for its consideration.

The order directing Mr. Field to complete the sale was made upon the master's report setting forth the sale, and his refusal to complete upon the ground of his being advised by counsel that Clarke was not authorized to mortgage the premises and therefore the title under the decree would not be good. The report also stated Mr. Field's willingness to complete his purchase upon the court's decreeing that Clarke had such authority and that the sale would give a good and valid title. The master's report was submitted to the Chancellor, and the only evidence of his decision, is the order directing Mr. Field to complete the sale.

The question of parties was not brought up by the report, although from the form of the proceeding it is manifest that the report and order were an amicable proceeding. And there is no evidence that this question was presented to the Chancellor, or was thought of by the purchaser or his legal advisers.

The report bears date in New York on the 31st of March, and the order thereon was made at Albany on the 4th of April, 1820. It is quite impossible, under all these circumstances, to assume that the Chancellor decided upon that occasion, the question of parties which is now before the court; however desirous the court may be to uphold a title purchased under its decrees.

I. My first inquiry therefore is, what was the estate, interest or right, which the children of Thomas B. Clarke had in the property in controversy, at the time of the foreclosure of Mapes and Oakley's mortgage?

Before that period, the legal title had been divested from the trustees named in Mrs. Clarke's will, and for the present I will assume that it was then vested in Thomas B. Clarke and James A. Hamilton; the latter having an estate for the life of Clarke in trust for him, and Clarke himself having the legal remainder in fee, in trust for his children who should be living at his death, and absolutely for his own benefit if he died leaving no issue living.

In the case of *Cochran v. Van Surley*, (20 Wend. 365,) in the Court for the Correction of Errors, the legality of Clarke's conveyance of certain lands held under the will of Mrs. Clarke and sold under the statutes of the state and the order of the Court of Chancery which form so large a portion of this case, was brought before the former court. In the prevailing opinion delivered by the Chancellor in that case, he says that the children of T. B. Clarke, in existence at the time those orders were made, *had a vested remainder in the estate* after his death, subject to open and let in after born children, and liable to be divested by the death of the children during the lifetime of their father. He also said in effect, that the interest of such after born children was a contingent interest until they came into existence.

In my view of the case of *Cochran v. Van Surley*, this construction of the will made by the Chancellor, was material to the decision in that cause, and is therefore an authority binding upon me. He said distinctly, that if the rights of any after born children had been presented in that suit, the validity of the acts of the legislature in reference to such rights, would be doubtful. If the rights of the children then in being, were a possibility and

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a mere contingency as is now argued, I do not perceive how the legislature could authorize the lands to be sold so as to bind them or those who upon their death before the possibility became reality, should succeed to the estate; any more than it could authorize the sale as to the possible rights of children of Clarke who might be born after the passage of the acts. And therefore it seems that in order to uphold the legislation in question, the Chancellor and the court of last resort, must necessarily have determined that the children then in being, had vested interests which the legislature could direct to be sold for their support and maintenance. When that case was before the Supreme Court, (*Clarke v. Van Surlay*, 15 Wend. 436,) the now Chief Justice said it was conceded on the argument, that the children took a vested remainder in fee in the land, and in his decision he took that to be a correct exposition of the will.

This strengthens the conclusion that the court of last resort sustained the sale made by Clarke which was then in controversy, on the ground that the right of his children in existence at the time of the sale was a vested remainder.

The Chancellor's construction in subsequent cases, accords with his opinion in *Cochran v. Van Surlay*.

Thus, in *Nodine v. Greenfield*, (9 Paige, 544,) the devise was to the widow for life, and after her death to the children of A. R. who should be living at her death, and the issue of such as should have died; and in default of such children or issue then living, then over to A. R., and if he were dead, then to the testator's next of kin. The Chancellor decided that the six children of A. R. living at the testator's death, took vested remainders in fee, subject to open and let in after born children of A. R., and subject to be divested by death during the lifetime of the widow. And in effect, he decided that the after born children took vested remainders when they were born respectively.

In *De Peyster v. Clendining*, (8 Paige, 295,) the testator vested the property in trustees, and after giving a life interest to his wife, and similar interests subject thereto to his respective children, directed the capital of the respective shares, upon the death of the children, to go to their issue; and if either of the children died without issue, their shares should go to the survi-

vors. In his opinion, the Chancellor says, "the children of Mrs. H. and of James C. (who were two of the trustee's children,) who are now in existence have *vested remainders* in the capital of the shares of their parents, subject to open and let in after born children; and subject also to be wholly divested by an entire failure of issue at the death of their parents respectively."

In *Moore v. Lyons*, (25 Wend. 119, 144;) the devise was to Mary for life, and from and after her death to her three daughters, or to the survivors or survivor of them, their or her heirs and assigns forever. The Chancellor in commenting upon it, remarks, that where a remainder is so limited as to take effect in possession, if ever, immediately on the determination of a particular estate, which is to determine by an event which must unavoidably happen by the efflux of time, *the remainder vests in interest as soon as the remainderman is in esse* and ascertained; provided nothing but his own death before the determination of the particular estate, will prevent such remainder from vesting in possession: yet if the estate is limited over to another, in the event of such death before the particular estate determines, his vested estate is subject to be divested by that event, and the interest of the substituted remainderman, which was before either an executory devise or a contingent remainder, will if he is *in esse* and ascertained, be immediately changed into a vested remainder.

This language, although not absolutely necessary to the decision of *Moore v. Lyons*, describes precisely the estate of Clarke's children at the period of the foreclosure of Mapes and Oakley's mortgage. Bayard Clarke, for instance, then had a remainder, which would take effect in possession if ever, at his father's death, an event certain to occur by the efflux of time; and nothing but his own death before his father's, would prevent his remainder from vesting in possession. Yet that contingency would divest his estate or interest, and it would then vest in his surviving brothers and sisters.

The authority of the Chancellor as thus exhibited in the cases which I have cited, must control in this branch of the court, unless the court of last resort has decided differently. That court, it is said has so decided in the cases growing out of the will of

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Medcef Eden. (*Jackson v. Waldron*, 13 Wend. 178, affirming the Supreme Court in *Pelletreau v. Jackson*, 11 ibid. 110.)

The decision in *Jackson v. Waldron*, even if the Eden will were synonymous in its terms with that of Mrs. Clarke, is met by that of the same court in *Cochran v. Van Surley*, if I am right in my observations upon the latter.

But the devise in the two wills is very different. Eden's will vested a qualified or determinable fee in the first taker, (*Waldron v. Gianini*, 6 Hill, 601,) and the gift over, was an executory devise. Mrs. Clarke's will gave a life estate to the first taker, with a direct remainder in fee to his children living at his death. The latter as they came *in esse*, became invested with a qualified fee in remainder, like that given in possession to the two sons of Eden. It would not come into their possession till Clarke's death, and was defeasible by their own prior deaths respectively. On the latter event, the executory devise in Mrs. Clarke's will, arose in favor of the substituted remaindermen.

With this brief remark, to point out in part, the difference between the two devisees, I will next attempt to show that the Chancellor's construction of the devise to the children of Clarke is the true one; and that if I err in supposing his opinion ought to control my decision, yet the law and his opinion correspond.

The circumstance that the legal title is given to trustees, makes no difference in the construction, and need not be again mentioned on this point.

A vested remainder, is one by which a present interest passes to the party, though to be enjoyed in future, and by which the estate is fixed to remain to a determinate person after the particular estate is spent. He has an immediate fixed right of future enjoyment.

A remainder is contingent, when it is limited to take effect on an event which may never happen, or which may not happen till after the preceding particular estate ends, or is limited to a person not in being or not ascertained. Now in this case, the event was certain, for T. B. Clarke was certain to die. The person was determinate, as soon as a child was born to him. (See *Doe v. Perry*, 3 T. R. 484.) The interest in remainder was doubtless contingent as to the children, before it was known that Clarke

would have issue. The unborn children had a right by way of springing use, and it was until their birth, a possibility only. But whenever a child is born to whom a remainder has been previously limited, such remainder then vests in the child, if he be certain to take it by the terms of the gift. Each child of Clarke was certain to take, unless his estate should be afterwards divested by his death in Clarke's lifetime. In respect of that liability to have the estate defeated, this remainder after the birth of a child, in no respect differs from the instances so common in the English conveyances and devises, of an estate given to A. for life; remainder to B. for life, remainder to C. for life, and then to D. in fee. It has never been doubted but that such remainders to B. and C. are vested.

Yet it is obvious, that the death of either B. or C. in the lifetime of A., will prevent the limitation in his favor from ever taking effect in possession.

It is the present capacity of taking effect in possession, if the possession were to become vacant, not the certainty that it ever will become vacant while the remainder continues, which distinguishes a vested from a contingent remainder. In other words, in the former *the enjoyment* is uncertain, in the latter *the right* to that enjoyment.

Thus in this case, in 1820 there was no certainty that Bayard Clarke would survive his father, and his remainder might therefore cease before the possession became vacant. This was no test of its character. But at that very time, if the possession had become vacant by the death of T. B. Clarke, Bayard C.'s remainder had a present capacity to take immediate effect.

Wherever the preceding estate is limited so as to determine on an event which must certainly happen, and the remainder is so limited to a person *in esse* and ascertained, that the preceding estate may by any means, determine before the expiration of the estate limited in remainder; such remainder is vested. And it is only where the event which is to be the termination of the preceding estate is such as may never happen, or the remainderman is not *in esse*, or not ascertained, or by its limitation some dubious event, other than the determination of the preceding estate,

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is required to give it a capacity to take effect; that the remainder is contingent. (2 Cruise, 271.)

It is not material to the remainder's *vesting*, that Clarke's children might not survive him. To prevent its vesting, the event must be one which will not certainly happen before the termination of the particular estate, and yet must arise before the remainder takes effect. There is no such event in this limitation.

Mr. Preston says, when a remainder is limited to a person *in esse*, and ascertained, to take effect by words of express limitation on the determination of the preceding particular estate, this remainder is most clearly and unquestionably vested.

A gift by remainder to a person, with superadded words of contingency, and with a limitation over on that contingency, will be vested and not contingent.

I derive these propositions from 2 Cruise's Dig. 260, 270, 271, Title, Remainder, chap. 1; and 1 Preston on Estates, 64, 67, 70, 73, 74.

It is scarcely possible to reconcile all the decisions that have been made on this subtle and perplexing subject.

But the current of authority in favor of holding the remainder in question to have been vested in the issue of T. B. Clarke as they respectively came *in esse*, is clear, strong and uniform. I will cite a few of the cases bearing upon the point.

In *Boraston's Case*, (3 Rep. 19,) the devise was to two persons for eight years, remainder to the executors until such time as Hugh B. should accomplish his full age of twenty-one years, and when he should come to his age of twenty-one years, then the testator willed that Hugh should enjoy it to him and his heirs forever. Hugh B. died under twenty-one; and it was contended that the remainder to him was contingent on that event. But it was adjudged to be a vested remainder, to take effect in possession at the time when he would be twenty-one.

In *Parkhurst v. Smith, Lessee of Dormer*, Willes Rep. 327; (S. C. 4 Bro. P. C. 405; 3 Atk. 135;) the limitation was to A. for ninety-nine years, if he so long lived, and after his death or the sooner determination of that estate, then to trustees during A.'s

life to preserve contingent remainders, and then to A.'s first son in tail male. The question was upon the legal estate in the trustees, and it was insisted that the remainder to them if not void for repugnancy, was at least contingent, because it could not arise upon any event other than A.'s surrender or forfeiture, neither of which was certain to happen. It was held by the King's Bench, and by the House of Lords on a writ of error, that the trustees took a vested legal remainder in the estate.

Lord Chief Justice Willes in delivering the unanimous opinion of the Judges in the House of Lords, declared that there were but two sorts of contingent remainders which do not vest; 1st. Where the person to whom the remainder is limited is not *in esse* at the time of the limitation. 2. Where the commencement of the remainder depends upon some matter collateral to the determination of the particular estate.

I may observe that the first sort mentioned by the Chief Justice, are no longer contingent after the remaindermen come *in esse*, and are ascertained. The remainder to T. B. Clarke's children therefore falls within neither class of contingent remainders as thus defined. The persons were ascertained, and it was to commence in possession on the determination of the particular estate, and upon no other matter or event.

Our Supreme Court, in *Doe v. Provoost*, (4 Johns. 61,) held that a devise to a daughter for life, and immediately after her death, to such children as she should have lawfully begotten *at the time of her death*, conferred a vested remainder in fee on the children who were living at the testator's death, subject to open for the benefit of children of the daughter who should be born subsequently.

Our courts thus followed the law as settled in England previous to the revolution.

Bromfield v. Crowder, (1 Bos. & P. New Rep. 313,) is a leading case in England, on this subject, after the decisions there ceased to be controlling. It was twice argued, and on each occasion most ably, and by counsel of the highest eminence. It came from the Rolls for the opinion of the Common Pleas. The testator devised his real estate to his wife for life, and then to J. Rose

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for life in case he survived her, and at the decease of both or the longest liver of them, he gave all his estate to his godson John D. Bromfield, *if John should live to attain the age of twenty-one years*, but in case he died before he attained that age, and his brother Charles B. should survive him, then he gave the estate to Charles if he lived to attain twenty-one and not otherwise; and in case both died under twenty-one, then he gave the estate to John Vale in fee.

The widow and J. Rose died while John D. B. was under the age of twenty-one years, who thereupon claimed the estates. The heir at law on the other hand insisted that the remainders to John and those subsequent, were contingent, and because of the determination of the particular estates before the contingency happened, the remainders could never take effect.

The court certified unanimously that John D. Bromfield took a vested estate in fee simple, determinable upon the contingency of his dying under the age of twenty-one years.

The Master of the Rolls thereupon decreed accordingly, and his decree was affirmed by the Chancellor, and on appeal to the House of Lords, the question was argued there and the decision sustained. See this stated in 5 Dow's P. C. 207, 215, and in 14 East, 603, where it is erroneously mentioned as having gone to the House of Lords on a writ of error.

In *Doe, ex dem. Hunt, v. Moore*, (14 East, 601,) the devise was to John M. "*when he attains the age of twenty-one years*," but in case he should die before he attained that age, then to his brother James when he attained the age of twenty-one, with a like limitation over. John M. was under twenty-one when the testator died. It was decided that he took an immediate vested estate, which was liable to be divested upon his dying under twenty-one years of age.

In the next case which I shall cite, the limitation to the children was in favor of such as should live to be twenty-one. The contingency was therefore precisely similar in its uncertainty to that in Mary Clarke's will, and in both instances the children were all born after the death of the testatrix.

Sarah Trymmer, being seised in fee, devised her lands to John

Roake (her nephew and heir,) for life. The devise over was as follows: "And on the decease of my said nephew, John Roake, I devise all my said estates to and among his children lawfully begotten, equally, at the age of twenty-one, and their heirs as tenants in common, but if only one child shall live to attain such age, to him or her, and his or her heirs, at his or her age of twenty-one. And in case my said nephew John Roake shall die without lawful issue, or such lawful issue shall die before twenty-one, then I devise all the said estates to and among my nephews and nieces, Miles, Thomas, John, James, and Sarah Pinfold, and Susannah Longman, or such of them as shall be then living, and their heirs and assigns for ever."

At the death of the testatrix, John Roake was a widower, without issue. He afterwards married and had four children, who were lessors of the plaintiff. After the birth of two of the children, he levied a fine of the lands in his own favor, in fee. The defendant held under the fine. The four children survived John Roake and two of them had attained the age of twenty-one years, and two had not, when the suit was commenced. The question was, whether the children took vested interests before they became of full age.

The case came before the King's Bench in 1813, in *Doe, ex dem. Roake, v. Nowell*, (1 M. & S. 327,) and was elaborately argued by Mr. Preston, against the children of John Roake. The court held that the children took vested remainders. In 1817, a case upon the same devise was removed to the House of Lords, and after a very full argument by distinguished counsel, the decision of the King's Bench was affirmed. (*Randall v. Doe, ex dem. Roake*, 5 Dow's P. C. 202.)

Machin v. Reynolds, (3 Brod. & B. 121,) was a case sent by the Vice-Chancellor for the opinion of the Common Pleas. The testator devised his real estate to his sister and his nephew for their joint lives, and to the survivor for life if the one deceased left no issue; and one-half to the survivor for life, if the one deceased left issue, the income of the other half to be paid to such issue during their minority. And when and as the children of the sister and nephew respectively, (if any there were,) should attain their age of twenty-one years, then the whole was

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given equally to and among all such children in fee. And in case the sister and nephew should both happen to die without leaving issue, or there being such they should happen to die under the age of twenty-one years and without issue, then the estate was given to one Moseley in fee. At the death of the testator, the nephew had a daughter, who then was and still remained his only child. The sister was never married. Both sister and nephew were living at the time of the decision.

The court held that the nephew's daughter, upon the death of the testator, took an estate in fee, in remainder during the lives of the *cestui que vies*, subject to be divested in part, by the birth of other children of the nephew and sister or of either of them, and determinable altogether in the event of her dying in the lifetime of the nephew, or under the age of twenty-one, without leaving issue.

In *Farmer v. Francis*, (9 Moore, 310 ; S. C. 2 Bing. 151,) on a case sent by the Vice-Chancellor, the testator gave all his residuary estate in trust, for the use of his wife during her life, and from and after her decease for the use of his daughter Mary Frances for her life, and from and after the death of both the wife and daughter, or the survivor of them, (still in trust) to and among all and every the child or children of Mary Frances as should be living at the death of such survivor, equally, if more than one, to be divided share and share alike, when and as they should respectively attain the age of twenty-four years, and to their respective heirs, &c. forever, to take as tenants in common ; and if only one, then the whole to such child upon attaining that age. But in case of no issue of Mary F. living at the death of such survivor, or being such they should all die without issue under twenty-four, then upon trust for two grandsons of the testator.

The testator died in 1814, the widow in 1818, and Mary Frances in November, 1821. At her death she left seven children, the youngest of whom was born in 1817. The court decided (in 1824,) that the seven children took equitable estates in fee as tenants in common.

In that case, besides the qualification that they should be living at the death of the second tenant for life, there was the fur-

ther limitation that they should attain the age of twenty-four years. Yet it was held a vested estate in the children living at the testator's death, and which opened and let in the after born children, (the latter on their birth taking a vested interest,) and that too without reference to their being under the age of twenty-four years.

The case called for no opinion as to the determination of their estate upon their dying under twenty-four without issue.

The case of *Warter v. Hutchinson*, was sent by the Vice-Chancellor to the Common Pleas; and afterwards to the King's Bench in 1823. (2 Br. & B. 349; S. C. 5 Moore, 143; 1 B. & C. 721; S. C. 3 D. & R. 58.) It arose upon a devise to trustees of a complex character, but in effect it was for J. W. for life when he arrived at twenty-one, with remainder in tail to his children, but if he died under twenty-one, then for H. W. for life, when he attained twenty-one, with remainder in tail to his children. J. W. survived the testator, but died under twenty-one leaving a daughter. H. W. became twenty-one. The decision in both courts was that J. W. at the death of the testator took a vested estate for life, and on his own death, his daughter took an estate in tail; and that H. W. at the testator's death took a vested estate for life in remainder expectant on the death of J. W. and failure of his issue.

In *Doe, d. Bills, v. Hopkins*, (5 Queen's Bench R. 224, and 8 Lond. Jurist R. 142, Mich. T. 1843,) the testatrix devised real estates to her grandsons, T. and W., in equal moieties during their lives, and after their decease she gave T.'s moiety "to such child or children as he should happen to leave lawful issue at time of his decease, and to their, her or his heirs and assigns for ever, to take in equal shares if more than one." She gave W.'s moiety in like manner to his children. She then, if either T. or, W., or both, should die without lawful issue, substituted J. another grandson, in all respects for the moiety of the one or both so dying, and with similar limitations to J. and his children. And if all three died without lawful issue, or if leaving issue such issue should die under twenty-one without issue, then the estate was to go to the sisters of the testatrix in fee. T. and W.

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survived the testatrix who died in 1816. At her death T. had a daughter who died in 1821. In 1818, E. another daughter of T. was born, who was a lessor of the plaintiff. In 1827, T. and W. suffered a common recovery with double voucher, and in 1828 T. died.

It was held that the remainder to the children of T. vested in them, and on the birth of E. she took a vested estate which was liable only to open and let in after born children of T., and which was not barred by the recovery.

The cases of *Duffield v. Duffield*, (3 Bligh's R., N. S. 260,) and *Phipps v. Acker*, (3 Clark & Fin. 665, 702,) in the House of Lords, are sometimes referred to as conflicting with the previous authorities; but as I think without good reason.

In the former, one of the devises was to the son of A. *who should first attain the age of twenty-one years, and should on attaining that age, take the testator's name.* It was therefore in every sense contingent. There was no person *in esse* who certainly answered the description; and if any-one were described, he might refuse to change his name.

It is true that some of the reasoning of the judge who delivered the advisory opinion to the house, is adverse to the decision in *Bromfield v. Crowder*, and *Randoll v. Doe*; and he relies upon the nice distinctions upon the use of the adverbs of time, "*when*" and "*if*," and "*at*," which though introduced from the civil law courts into the law of legacies, do not apply to real estate, as is shown by the case of *Bromfield v. Crowder*, and cotemporary decisions.

The same observation may be made respecting the judgment of the Court of Exchequer in *Festing v. Allen*, (12 Meeson & Welsby, 279,) which was decided at the same term with *Doe, d. Bills, v. Hopkins*, and is not entirely harmonious with the decisions from *Boraston's Case* downwards.

The other case said to be conflicting, is *Phipps v. Acker*, and *Acker v. Phipps*. There the devise, was to trustees, in trust to convey the testator's lands in W. to G. H. A. when and so soon as he should attain twenty-one, but in case of his dying under that age and without issue, then over to a residuary devisee; and in trust to convey the residue of the testator's lands to J. C

A. when he should attain the age of twenty-four, upon his giving security for certain legacies, &c., but in case J. C. A. died before he became twenty-four, without issue then over. G. H. A. and J. C. A. were both infants at the testator's death. The Vice-Chancellor, (*Phipps v. Williams*, 5 Simons, 44,) decided that G. H. A. took a vested estate, but that J. C. A.'s interest was contingent on account of the condition attached that he should give securities, &c., on attaining the prescribed age.

In the House of Lords, the opinion of the court was delivered by Lord Brougham; and although he finds fault with the decision of Lord Ellenborough in *Doe v. Moore*, and criticises some of the kindred cases, yet he concluded that J. C. A. took a vested interest in the interim rents, &c.; and the House reversed that part of the Vice-Chancellor's decree. In regard to the interest of G. H. A., the appeal was never decided.

These recent cases do not impair the great strength of the authorities to which I have referred in support of the position that the children took a vested remainder under the will of Mrs. Clarke. Indeed, the latest case in the House of Lords, *Acker v. Phipps*, as well as that of *Doe v. Hopkins*, which is the last reported in the Queen's Bench, fully sustains those authorities.

I refer also to the following as agreeing in substance, with those which I have stated. *Doe v. Martin*, (4 T. R. 39;) *Stanley v. Stanley*, (16 Ves. 491;) *Osbrey v. Bury*, (1 Ball & B. 53;) *Driver, d. Frank, v. Driver*, (6 Price, 41,) in the Exchequer Chamber; *Carver v. Jackson, ex dem. Astor*, (4 Peters, 1, 90;) and 1 Rev. Stat. 723, § 13, where the distinction adopted between vested and contingent future estates, brings the remainder in question within the class of vested estates.

Some of these cases cannot be distinguished from the one under consideration, and the elder decisions are authority; while the later ones are adjudications entitled to the highest respect, as showing what was the common law on this subject.

They are in accordance with the maxim of the law that these limitations shall be construed as vested interests, whenever they can be so taken without doing violence to the expressed intention of the grantor or testator.

And the result of the decisions appears to be, that where the

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limitation is to take effect on an event certain to occur, and the person to whom it is limited is ascertained, it shall be deemed a vested remainder; and any provision or contingency which may prevent its ever coming into possession, or may entirely cut it off, is considered a condition subsequent.

The direction that the trustees are *to convey* the property to the issue of Clarke living at his death, in no manner affects the point. The issue would be deemed in equity as having the whole interest after the death of Clarke, without any regard to a conveyance of the legal title. And the objects of the trust having been accomplished, the estate would now be held a legal estate in those entitled under the will. (1 R. S. 727, § 47, 48; *ibid.* 730, § 61. *In the Matter of De Kay*, 4 Paige, 403. And see *Eckford v. De Kay*, 8 Paige, 89, 94, and 26 Wend. 29 on appeal.)(a)

My conclusion is that the children of T. B. Clarke, who were living at the commencement of Mapes and Oakley's foreclosure, had at that time, a vested equitable remainder in fee simple in the lands mortgaged. It was to take effect on the death of their father, was liable to be divested as to either child by his or her death before that event, and was subject to open to let in after born children of Clarke.

II. Were the children of Clarke then in being, necessary parties to the foreclosure of the mortgage; and were their rights barred or affected by the decree in favor of Mapes and Oakley?

The general doctrine is that all persons whose interests are to be concluded or affected by the decree, ought to be made parties.

This applies to mortgage cases; and all persons having an interest in the equity of redemption, should be made parties to a bill of foreclosure, and *a fortiori* to a bill for a sale of the property mortgaged. (Story's Eq. Pl. § 193. 4 Kent's Comm. 185, 186, 2d ed.)

Chancellor Kent says, that the general rule includes the heir or devisee, the tenants for life, and the remainderman. He adds,

(a) And see also *Bellinger v. Shafer*, ante, p. 293.

"The question of parties is usually more or less fluctuating and open for discussion. It is governed, in some degree, by circumstances; whereas, the principle that those persons who are interested in the subject, and are not made parties to the suit, are not bound by the decree, is more steady in its operation, for it is founded on natural right."

The defendants contend however that this case is an exception to the general rule. That the circumstance that the trustee was a party, and represented the legal estate as well as the ultimate remainder, was sufficient to bring the rights of the children before the court, and enable it to dispose of the whole subject intelligibly. And this was especially the case, it is said, because the infants were *quasi* wards of court by reason of the acts of the legislature and the orders of the court thereupon; and the master in chancery, who under those orders was bound to protect their interests, was also a party to the foreclosure.

It is conceded to be the general rule, that if the equity of redemption is vested in a trustee in trust, the *cestuis que trust* must be made parties to the foreclosure. All the books agree in this. (Story's Eq. Pl. § 193, 197, 207. Calvert on Parties, 181, 182. *Gore v. Stackpoole*, 1 Dow's P. C. 18, 31, per Lord Eldon.)

The only established exception, is in cases of remote limitations of the equity of redemption; in which, on account of the impossibility of bringing in parties not *in esse* or not ascertained, but who ultimately may become entitled, it is held sufficient to bring before the court the persons *in esse* who have the first estate of inheritance, together with the persons having all the precedent estates and prior interests.

In this case no person was made a party who had a vested estate of inheritance, or who had the first estate of inheritance in the mortgaged premises. I speak now of the substance, not forgetting that the trustee had the naked legal title.

The case of *Nodine v. Greenfield*, before cited, (7 Paige, 544,) shows the rule where there are successive estates in the equity of redemption; but in that case there was no trust. *The Eagle Fire Insurance Company v. Cammet*, (2 Edw. Ch. R. 127,) was a similar case.

In *Calverley v. Phelps*, (6 Madd. 229,) the general rule was en-

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forced in a case falling far short of this in the necessity of its application. The equity of redemption had been conveyed to trustees to sell and divide the surplus among persons specified, and the receipt of the trustees was to discharge the purchasers. It was held that the *cestuis que trust* were necessary parties to a bill brought to foreclose the mortgage. (And see *Holland v. Baker*, 3 Hare's Ch. R. 68; *Barkley v. Lord Reay*, 2 *ibid.* 306; *Wilton v. Jones*, 2 Y. & C. Chy. Cases, 244.)(a)

In *Yates v. Hambly*, 2 Atk. 238, (cited by the defendants,) on a bill to redeem, which presents an analogous case, Lord Hardwicke required the first tenant in tail at least to be brought in; and his language shows he would have required it if the conveyance had been in trust with a plain limitation.

In short, the general rule required that these children of T. B. Clarke should be made parties. No authority has been found which dispenses with the necessity of bringing the beneficiaries before the court under such circumstances. Common sense and common right required it. And in no conceivable case, could it be more important to the ends of justice, than in the one before me, where those intrusted with the care of this property, had exhibited so much looseness, if not recklessness, in regard to the interests of the owners of the inheritance.

The cases and treatises cited in support of the omission of the children, do not come up to the point.

The doctrine of representation stated in Mr. Calvert's Treatise, (p. 19, 20,) has no application; as may be seen by referring to what he says of trustees and *cestuis que trust*. (Calvert, 207, &c.)

Nor are the extreme cases any guide, in which from the multitude of parties in interest, the courts have hesitatingly and in a

(a) In *Anderson v. Stather*, June 27, 1845, before Sir Knight Bruce, V. C., where the mortgagor conveyed the equity of redemption to trustees, in settlement for his daughter on her marriage, out of which she was to receive an annuity, and the trustees were to raise out of the same a sum of money for the children of the marriage; it was held that the daughter and her children were necessary parties to a suit for the foreclosure of the mortgage. (9 Lond. Jur. Rep. 806; 14 Law Journal, N. S., Chancery, 377; 2 Eq. Rep. 245.)

few instances, suffered some of the parties, *having the same degree or extent of interest*, to prosecute or defend for the whole.

Suits for administration, form a distinct class, in which legatees, creditors, &c., come in after decree, and participate in its fruits. *Drew v. Harman*, (5 Price, 319,) was suffered to go off on that principle, although a questionable application of it.

It is true that in our practice, we permit a party who assails a deed of trust on the ground of fraud, to proceed against the trustee alone; yet it is not permitted where the complainant is endeavoring to enforce a claim adverse to the interests of the *cestuis que trust*, but which is founded upon the assumed validity of the deed. (*Rogers v. Rogers*, 3 Paige, 379.)

I do not perceive that the complainants rights could be any more affected by a decree of the Court of Chancery to which they were not parties, because the court had previously interfered with their property in obedience to the special acts of the legislature; or because a master of the court, who acted in that behalf under the orders stated in the pleadings, happened to be vested with T. B. Clarke's life estate, and was for that cause made a defendant in the foreclosure suit.

Nor does it aid the defendant's case, that T. B. Clarke was the natural guardian of these children, or that he was in effect their special guardian for the management of the estate. Their case is presented in all its strength, by the fact that he was their trustee and vested with the whole legal title; and this as I have shown, does not suffice.

It is said also that Mr. Field was a purchaser in good faith under the decree, without notice, and the court having compelled him to take the purchase, ought to protect him.

Assuming that he was such a purchaser, it does not affect the question. A decree had been made, which was a nullity as to the complainants. The court, knowing nothing of this, and Mr. Field's counsel having failed to discover it and present it to the consideration of the court, made an order to complete the sale. Such order was indeed a matter of course upon the case presented by the master's report, under the Chancellor's view of the authority of T. B. Clarke. If the court guaranteed the titles made under its sales, or undertook to the public that none but good

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titles should be sold under its decrees, the argument would have force. But the court holds out no such inducements to purchasers. At most, it will refrain from compelling a bidder to take a defective title, on his pointing out the defect or impediment.

It becomes my duty to hold that the rights of the complainants were not foreclosed or affected by the decree in favor of Mapes and Oakley.

III. The validity of the mortgage is the next point in the cause.

The complainants insist that it is invalid and entirely void because, 1. the acts of the legislature on which it was based were unconstitutional, 2. the orders of the Court of Chancery were not in conformity with the acts, and 3. the mortgage was not in pursuance of the orders of the court.

The first of these objections has been overruled in our court of last resort, and my conclusion upon the others relieves me in a great measure from the painful responsibility of examining them at large.

When Mr. Field refused to complete his purchase, Chancellor Kent decided distinctly, that T. B. Clarke was authorized to mortgage the premises in question, *for the debt and under the circumstances* set forth in Mapes and Oakley's bill. Although this decision is not conclusive upon the complainants, it is binding upon me as the judgment of the then head of the court, and no less as the judicial opinion of one of the purest and ablest chancellors that ever administered the principles of equity.

The bill of Mapes and Oakley states that they were merchant tailors, and that T. B. Clarke became indebted to them in \$1000 for wearing apparel furnished by them to and for Clarke and his children from the 15th of January, 1815, to October 16th, 1818, which is the date of the mortgage; and that the mortgage was given to secure its payment.

So far as the facts proved in this suit sustain that statement, I must hold the mortgage to be valid under Chancellor Kent's decision, without any examination of the soundness of his conclusion. As to the other consideration proved, it will depend upon its own merits, unless it be within the principle of that decision.

At the date of the mortgage, as I construe the testimony, Clarke owed to Oakley, on an account commencing January 20, 1815, \$171; and \$150 25, besides interest, on a note given January 10, 1815, for a previous account, running from May, 1813. And he then owed to Mapes and Oakley a balance of book account of \$273 77. All these accounts were for wearing apparel for Clarke and his children, although but a small proportion was for the latter. As to the orders for clothing drawn by him in favor of third persons, I will not after this lapse of time, say that they were not given for necessaries obtained for himself and his family. Nor can I perceive any reason why Chancellor Kent's principle does not cover the debt incurred in 1813 and 1814, as well as that in the subsequent years.

These items amount to \$595 02, and with the interest on the note after six months, make an aggregate of about \$630 for which the mortgage is to be deemed clearly valid.

For the remaining consideration, Mapes and Oakley gave to Clarke on the 19th May, 1819, their note for \$158, and in the meantime they had furnished to him clothing amounting to \$158 50. There was moreover an account against Clarke, contemporary with the prior tailor's bills, for cash lent to him in trifling sums; and this account doubtless made up the balance of the \$1000.

I will consider Chancellor Kent's decision as extending to the cash thus advanced. But it does not cover the note or the clothing delivered after the mortgage was executed.

As to the latter, it is plain that the orders of the court did not confer upon Clarke an authority to mortgage his children's lands for clothing *thereafter to be furnished* either to him or them.

Then as to the note, (and in considering it I do not go back of the orders made under the acts of the legislature,) the most favorable view of the transaction is that at the time of giving the mortgage, Mapes and Oakley verbally agreed to advance in cash whatever balance there might be of the \$1000, after deducting their old note and book debts; and that seven months afterwards, they gave their note for such balance. I cannot presume that the verbal agreement was for any definite sum in cash, because the balance was only obtained subsequently by deducting the

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account which accrued after the date of the mortgage. The note was paid by Mapes and Oakley, and it may be assumed that they were sufficiently responsible to make good their promise.

The order of May 30th, 1816, giving its terms the full import claimed for them, authorizes Clarke to mortgage the property therein referred to, for securing *the sum or sums of money to be advanced or lent to him or for his use, by the mortgagee or mortgagees.*

A promise to advance money at a future period, is not money lent or advanced. And as this was a power of a very extraordinary character, if not in derogation of common right, no court can extend it by construction. (See *Bloom v. Burdick*, 1 Hill, 140; 6 *ibid.* 415, *Rogers v. Dill*.)

The mortgage was therefore beyond the authority conferred, in respect of this note. The subsequent giving of the note and its payment at maturity, did not make good by relation, what was invalid in its inception and execution.

Upon the whole, the mortgage is to be deemed valid for \$683 50, at the time it was executed.

The defendants have succeeded to the rights of Mr. Kennedy under the mortgage which Clarke executed to him. This mortgage is also alleged to be invalid. The testimony in regard to it is not full or satisfactory, and as it is not indispensably necessary to decide upon it in this stage of the cause, it will be more conducive to a just conclusion, to leave its entire or partial validity for determination on the reference which will follow a decree for redemption on the other mortgage. The parties can thus produce further testimony on the subject.

IV. The defendants in the last place, contend that Mrs. Williamson and Mrs. Cochran are barred by the limitation of ten years prescribed in the revised statutes for the commencement of suits in equity.

Mr. Field obtain possession of the premises in March or April, 1827, which was after the death of the tenant for life.

At that time all the children were under age, but Mrs. Williamson's minority terminated in 1828, and Mrs. Cochran's in 1830. The disability arising from marriage was, in the case of

each, subsequent to the accruing of their perfect right to redeem, and cannot be tacked to that founded upon their infancy.

As the law was in April, 1827, each of these parties had twenty years in which they were entitled to redeem. (*Moore v. Cable*, 3 J. C. R. 385; *Burke v. Lynch*, 2 Ball & B. 426.) So that when the revised statutes went into effect, each was entitled to about seventeen years for that purpose.

It is claimed that the revised statutes cut off seven years of this period, and if they did, these two complainants were barred before the commencement of their suit.

I do not find that it has ever been decided, that the fifty-second section of the sixth article of the title of the revised statutes relative to the time of commencing actions, (which introduced a law entirely new,) is applicable to cases where the right of action existed before they took effect.

It has been decided in some cases, that statutes of limitation affect *the remedy* and not *the right*. But the grounds of this conclusion do not appear sufficiently forcible to me, to warrant a court in construing such a statute in a manner which will in effect defeat a vested right by an abrupt termination of every remedy for it, unless the language of the statute itself imperatively requires that construction. If the section in question is to be applied to all prior equitable rights, a party who on the last day of December, 1829, had ten years in which to bring his suit, might on the next day find himself barred by lapse of time. Or if in December, 1829, he had only nine years left in which to redeem his estate from a mortgage, he would on the first day of the new year, be barred of his right, and his estate be gone.

I know it is said, that the construction of the statute must be such as to give the full ten years from January 1, 1830, or at all events to give that period in all cases where there remained ten years under the old law. This is argued upon the impossibility of attributing to the legislature, such an outrage upon all right, as to cut off a remedy suddenly and absolutely, by an act of limitation.

But the statute itself says nothing of ten years, or of any other term, from the *time it goes into effect*. Its language is plain and positive, "*within ten years after the cause thereof shall accrue*,

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and not after." It is equally plain that the right in this case had accrued in 1827, and by the clear terms of the law, if applicable to it, was barred in 1837.

In order to construe the statute in the mode suggested, we must add to the section "or within ten years after this article takes effect." No construction, it seems to me, can put that idea into the section as it now stands. And it is certainly as reasonable and just, to presume that the legislature did not intend to affect, impair or diminish, existing rights at all; as it is to engraft an addition upon the section in the statute in order to save it from absurdity; or force it by the construction which I have just mentioned. But I think the language of the article itself precludes both the addition and the construction which is thus claimed. The limit is not as in section eighteenth relative to actions at law, "after the cause of such action *accrued*." It is "within ten years after the cause thereof *shall accrue*." The statute speaks from the time it took effect, and it thus applied to cases which *should accrue* after that time, and not to those which had already *accrued*.

I submit also that upon sound rules of construction as well as of justice and morality, it may be shown that this section of the article did not apply to existing rights of action.

It does not in express terms, affect such rights. On the contrary, its terms look to the future. In connection with the 49th section respecting concurrent jurisdiction in law and equity, and the 45th section which was inserted for greater caution and expressly excludes the provisions of the first four articles from affecting rights of action which had then accrued; the 52d section admits of a construction which refers it to future rights alone. (2 R. S. 300, 301.)

The revisers note to section 45th shows that they did not design to give to any part of that title, a retroactive effect. (3 R. S. 704, 2d ed.)

The general rule is that no statute is to have a retrospect beyond the time of its commencement; *nova constitutio futuris formam debet imponere, non præteritis*. (Bac. Abridg. Statute, C.; Dwaris on Stat. 680; 1 Kent's Comm. 455, 2d ed.) And in his masterly judgment in *Dash v. Van Kleeck*, (7 Johns,

R. 477, 500,) the learned commentator shows that this is a principle of universal jurisprudence.

In the case just cited, the defendant relied upon an act passed, pending the suit, which declared the construction of a previous statute, and if applied to previous cases, in effect, exonerated parties from the consequences of a different construction which it had received in the Supreme Court. It was decided by that court, that the act relied upon, did not operate retrospectively, or affect the suit. Although Judge Spencer delivered a strong dissenting opinion, I believe the arguments of Chief Justice Kent and Judge Thompson on the other hand, have always commanded the assent of the bar, and of jurists, wherever the report of the case has been read.^(a)

In *Sayre v. Wisner*, (8 Wend. 661,) the point was presented in a case arising under the revised statutes as to dower. By 1 Rev. Stat. 742, § 18, it is enacted that a widow shall demand her dower within twenty years after the death of her husband. The husband in that case had been dead more than twenty years before the revised statutes. The provision was new, and abridged the previous term allowed for the widow's entry, and if it were applied to the case, it cut off the plaintiff's remedy. The Supreme Court held it to be a statute of limitation, but that it did not operate retroactively, and did not therefore affect the claim. Chief Justice Savage said, no statute, as a general rule is to have a retrospect beyond the term of its commencement. And, "a statute never ought to have such a construction as to divest a right previously acquired, if it be susceptible of any other; giving it a reasonable object and full operation within such construction."

The saving clause referred to in that case, (1 R. S. 750, § 11,) speaks of vested *estates, interests or rights*. It of course had no

(a) In *Quackenbush v. Danks*, (1 Denio, 128,) the same doctrine was applied by the Supreme Court to a statute exempting property from execution and distress for rent. (And see the argument of Bronson, Justice, in *Sackett v. Andross*, 5 Hill, 334, &c. Also, *Doe, d. Evans, v. Page*, 5 Queen's Bench R. 767, and 8 Lond. Jur. Rep. 399; *Doe d. Jukes v. Sumner*, 14 Mees. & Welsby, 39, and 9 Lond. Jur. Rep. 413; *Doe v. Angell*, 10 ibid. 705, in the Queen's Bench, Feb. 12, 1846.)

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bearing, if as is contended, a statute of limitation affects the *remedy* only.

- In *The People v. The Supervisors of Columbia County*, (10 Wend. 362,) which arose under the general statute of limitations in the revised statutes, Chief Justice Savage says, "those statutes, like all others, are prospective, and so are to be construed, unless otherwise expressed; or unless they cannot have the intended operation, by any other than a retrospective construction."

The same doctrine precisely, though in reference to another part of the statutes, is laid down by the Supreme Court in *Hackley v. Sprague*, (10 Wend. 113.)

And in *Johnson v. Burrell*, (2 Hill, 238,) Judge Cowen of the same court, when speaking of the construction of a statute, says, "It is a general rule that a statute affecting rights and liabilities should not be so construed as to act upon those already existing. To give it that effect, the statute should in terms declare an intention so to act."

In *Cruger v. Hamilton*, (January, 1841,) my learned predecessor declared his opinion that the 52d section of the statute of limitations, did not apply to causes of action which had accrued before it went into operation.

With these lights for my guidance, and with a deep sense of the sound propriety of the principle which governed them, I am confident that I shall best promote the true intent of the provision of the revised statutes under consideration, by construing it to have no application to the complainants rights which were vested and perfect before those statutes took effect.

The complainants insisted that if any of the provisions of the sixth article were applicable to the case, they were still in time under the 49th section, because they had a remedy at law by ejectment, and the jurisdiction being thus concurrent, they are not barred short of the 20 years allowed for bringing ejectment.

This ground was taken on the assumption that the mortgage was wholly void; yet that the complainants might waive that position.

The mortgage being valid in part, it is an interesting inquiry, whether the complainants could bring ejectment; and if so, whether the remedy for redemption in equity is a *concurrent*

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jurisdiction within the 49th section. The former depends upon the legality of Mr. Field's possession as against the remaindermen who were not affected by the decree under which he purchased; the possession having been rightfully acquired in respect of the tenant for life. (See *Van Dyne v. Thayer*, 14 Wend. 233; and 19 *ibid.* 162; *Phyfe v. Riley*, 15 *ibid.* 248; *Watson v. Spence*, 20 *ibid.* 260; 4 Kent's Comm. 188, 2d ed.)

In the view I have taken of the effect of the limitation prescribed in the 52d section of the same article of the revised statutes, it is unnecessary for me to pursue this inquiry.

There must be the usual decree for a redemption and for taking the accounts before a master.

H. H. & S. F. SLATTER v. CARROLL and others.

Where a resident of another state, owning lands here, conveyed them to a trustee residing here, in trust to sell the same, and out of the proceeds, after paying certain specific sums, to remit the balance to a person residing at the grantor's domicile, to be by him applied rateably upon all the debts of the grantor; and the grantor died insolvent, owing debts at his domicile and in other more distant states, and leaving executors who qualified at his domicile; it was *held*, that any of his creditors might file a bill in this state, in behalf of themselves and all other creditors, against the trustee, the distributor of the fund, and the executors of the grantor; to have the lands sold, the accounts of the trustee taken, and the fund distributed to the creditors.

The trust fund being real estate situated here, and the trustee a resident of this state, the jurisdiction of our court of chancery is unquestionable.

And where there are real assets, the court will not hesitate to administer them, although no personal representative has been appointed here.

The foreign executors may, in such a case, be made parties in that capacity.

It is no objection to entertaining the jurisdiction, that the creditor instituting the suit, resides at the place of the grantor's domicile.

The rule of distribution, must be that of the trust deed, when that is not repugnant to the laws of this state.

The court will direct the fund to be remitted, pursuant to the deed of trust, to the person therein designated, for distribution; or will retain it and distribute it here, according to the circumstances of the case, in reference to the convenience of creditors and of the accounting parties.

A creditor of a partnership cannot proceed in equity against the estate of a de-

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ceased partner, without showing that he has exhausted his remedy at law against the surviving partners ; or that a resort to legal process against them would be unavailing.

This may be established by proof that the survivors are insolvent and have no visible property or assets liable to execution.

Nov. 15, 1844 ; Jan. 6, 7, 11, and 13, and April 11, 1845. Decided July 22, 1845.

THE bill was filed on the 11th day of December, 1841, by Hope H. Slatter and Shadrack F. Slatter, in behalf of themselves and all the other creditors of Luke Tiernan, late of the city of Baltimore, deceased, who might come in and contribute to the expenses of the suit ; for the purpose of enforcing the payment of a bill of exchange held by the complainants. The case, as made out by the pleadings and proofs, may be thus stated.

On the 19th of February, 1836, a bill of exchange for about \$20,000, was drawn by a house in the state of Mississippi, on the mercantile firm of Tiernan, Cuddy & Co., transacting business in the city of New Orleans, payable twelve months after date. This bill was presented by the holder and accepted in New Orleans by J. McGill Cuddy, the resident partner of that firm, which at that time was a commercial partnership and consisted of Luke Tiernan and his son Charles, (who were also partners together in trade at Baltimore,) and Calvin Tate, of New Orleans. On the 28th of April, 1836, the bill was purchased of the holder, by J. R. St. John, Gregory & Co. at New Orleans, for value, and when due it was presented to the acceptors and protested for non-payment. St. John, Gregory & Co. transferred the bill on the 24th of June, 1839, for its full value, to the complainants, one of whom resided in New Orleans and the other in Baltimore.

Tiernan, Cuddy & Co. failed in December, 1836, owing debts to the amount of five or six hundred thousand dollars. Luke Tiernan withdrew from that firm on the 1st of August, 1836, and died November 10th, 1839. Cuddy, another of the partners, died in the summer of 1840. C. Tate was insolvent after the failure of the firm until this suit, and destitute of property. Charles Tiernan, though domiciled in Baltimore, spent much of

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his time after the failure, in New Orleans, and was appointed the syndic there for winding up the partnership concerns.

In November, 1840, the complainants commenced a suit against C. Tiernan as the surviving and liquidating partner of Tiernan, Cuddy & Co., in the Commercial Court of New Orleans, and on the 10th of May, 1841, recovered a judgment against him for the amount of their demand. An execution was issued, on which there was collected about \$600. By the laws of Louisiana, they could on such a judgment, collect from the joint property of the partners, and from the separate property of the partner served with the process.

Tiernan, Cuddy & Co. were indebted to Luke Tiernan in an amount exceeding three hundred thousand dollars, and Charles Tiernan was wholly insolvent in 1840, and without any property subject to an execution at law. Soon after the bill in this cause was filed, he applied for the benefit of the insolvent laws of Maryland.

Luke Tiernan became embarrassed by the failure of the New Orleans house, and at his death was unable to pay his debts, including his liabilities as a partner in Tiernan, Cuddy & Co. On the 24th of September, 1839, he then being the owner of several thousand acres of land in the county of Alleghany and its vicinity in the state of New York, (portions of which had been contracted to be sold to the settlers on the tract,) Luke Tiernan and his wife executed a conveyance of the same in fee to Charles H. Carroll of the county of Livingston in the same state, in trust to execute deeds in fulfilment of the contracts of sale previously given, on receiving the price, and to contract to sell, and to sell and convey the residue of the lands from time to time, in his discretion, on certain terms of credit specified. Out of the net proceeds, the trustee was first to remit \$15,000 to Alexander Neill of Baltimore, to be by him paid to creditors of Luke Tiernan. He was next to remit \$12,000 to the wife of the latter, or to such persons as she should appoint, in consideration of her releasing her dower in the lands. The trustee, in the next place was to pay \$4450 to Luke Tiernan Brien of Baltimore. And he was to remit the residue of the proceeds of the lands, from time to time to Alexander Neill, to be by him applied to the payment of all

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the debts of Luke Tiernan, and if there were not sufficient to pay them all, then divide such proceeds amongst them rateably and in proportion. If there were a surplus, it was to be paid by Neill to Luke Tiernan, his heirs, executors, administrators or assigns.

Under this trust deed, Mr. Carroll prior to the commencement of the suit, had received and remitted \$8987 to Mr. Neill, towards the first sum payable out of the proceeds of the lands.

Luke Tiernan by his last will and testament, constituted Mr. Neill and Mr. Somerville of Baltimore, his executors; both of whom qualified, and received letters testamentary from the Orphans Court in the city of Baltimore. They advertised in that city in December, 1839, for creditors of the testator to present their claims.

The bill in this cause was filed against Mr. Carroll, Alexander Neill, and against Messrs. Neill and Somerville as executors, &c., of Luke Tiernan; and it prayed to have the complainants debt established, that the lands conveyed in trust should be sold and the proceeds applied according to the trust deed, and the accounts of the trustee taken.

All the defendants appeared and answered. Messrs. Neill and Somerville set up in their answer that the bill of exchange was void by reason of its having been given in Mississippi, for slaves purchased there to be removed from the state, contrary to the provisions of the constitution of that state; and that it was taken with notice of its consideration, by those who held it at its maturity. But the evidence did not sustain this defence.

When the cause was brought to a hearing, the proof relative to C. Tate's being destitute of property, was weak; and after the argument was closed, the complainants procured a stay of proceedings on motion, and took out a second commission to New Orleans, and obtained satisfactory evidence on the point. The cause was then brought to a hearing, *pro forma*, on the further testimony, in connection with that read before.

There was a great mass of documentary and other evidence; but it is deemed unnecessary to insert any more of it than has already been detailed.

J. P. Crosby and B. F. Butler, for the complainants.

J. C. Devereux, Jr., C. O'Connor, and George Wood, for the respective defendants.

The complainants made the following points.

I. The complainants are just creditors of the commercial firm of Tiernan, Cuddy & Co., of New Orleans, (of which firm Luke Tiernan was a member,) to the extent of the balance remaining unpaid, on the bill of exchange accepted by said firm, described in the bill, and having failed to obtain satisfaction of their said demand from the partnership property, the complainants are entitled to satisfaction, with other creditors of Luke Tiernan, whether joint or separate, out of his separate estate.

1. The drawees of the bill having their place of business in New Orleans, and the bill having been accepted and being payable there, and having also been there transferred to the complainants, the obligation and effect of the contract of the acceptors and the rights of the complainants as the holders of the bill must be determined by the law of Louisiana.

2. The acceptance of the bill by J. McGill Cuddy, one of the partners, in the name of the firm, bound the firm and each of its members jointly and severally.

3. At the time of the acceptance of the bill, Luke Tiernan was one of the partners, and as such he became liable jointly with the other partners, and also severally, for the amount of the bill.

4. The bill was transferred to St. John, Gregory & Co. for full value, who took the same in good faith, in the usual course of trade, and on the credit of the acceptors. In the hands of these holders the bill was unimpeachable, even if the consideration for which it was drawn was illegal, or though the bill was improperly accepted by Cuddy in the name of the firm. Besides, the consideration for which the bill was given was not illegal, and the acceptance was within the scope of the partnership, and was confirmed by the partners.

5. Complainants having paid a full consideration for the bill to St. John, Gregory & Co., are invested with all their rights and advantages, notwithstanding the bill was then past due. The bill is, therefore, unimpeachable in the hands of complainants, especially as they were informed by Charles Tiernan, one of the

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partners, that it was good and would certainly be paid, and had no notice whatever of any objection thereto.

6. The judgment recovered by the complainants in the Commercial Court of New Orleans was regular, valid and effectual, by the laws of Louisiana, to establish the right of the complainants to recover from Charles Tiernan individually, and out of any partnership property of Tiernan, Cuddy & Co. in his possession, the amount of the bill, and as the execution issued on this judgment was returned unsatisfied, the complainants were under no obligations to pursue farther, the assets of the firm or of the surviving partners.

7. The proofs taken in the present case, independently of the record of the judgment in Louisiana, fully establish the liability of Luke Tiernan as one of the partners; and the complainants are, therefore, entitled to satisfaction out of his separate estate.

II. The lands conveyed by Luke Tiernan to the defendant Carroll by the trust deed of 24th of September, 1839, being situated within this state, and the trustee Carroll being a resident thereof, and the other defendants, Somerville and Neill, having appeared to and answered the bill, this court has ample jurisdiction to ascertain the complainants debt, and to compel payment thereof out of the trust fund; and under the circumstances of this case, complainants are entitled to a decree establishing their debt, and providing for its payment out of any proceeds of the trust property now in the hands of the trustees, Neill and Carroll, or either of them, and which may be properly applicable to this debt; and if there be no such proceeds now in hand, or the same shall not be paid over as required; then to a decree for the sale of the lands described in the trust deed, for the satisfaction of their debt.

The counsel for the defendants presented the following points.

I. The complainants have not established any demand against the estate of Luke Tiernan, deceased.

1. The acceptance was founded upon an illegal and immoral consideration, and is void.

2. Luke Tiernan was not a member of the firm of Tiernan, Cuddy & Co. at the time the bill was accepted.

II. The complainants not having exhausted their legal remedies against the surviving partner, cannot claim in equity against the estate of Luke Tiernan.

1. The demand of the complainants is a *joint* demand.

2. There is no evidence whatever of the alleged insolvency of Calvin Tate, the surviving partner.

III. The trust in question was created by Luke Tiernan, deceased, for the purpose of withdrawing his funds from this state, and distributing the same amongst his creditors at his own domicile, and according to the law and usage thereof. The complainants have shown no equity requiring our courts to prevent its literal execution.

IV. No fraud, breach of trust, or wrong of any kind being shown, and the complainant's suit being consequently for the sole purpose of preventing a distribution in Maryland, and compelling an account and distribution in this, the foreign forum, instead of the forum of the debt, the debtor, and the creditor; this court, for the maintenance of comity between the states, should decline entertaining cognizance of the case.

THE ASSISTANT VICE-CHANCELLOR.—The proofs in the cause, sufficiently establish the liability of Luke Tiernan as one of the acceptors of the bill of exchange in question.

At the time of its acceptance he was a member of the firm of Tiernan, Cuddy & Co., which was a commercial partnership, transacting business in New Orleans. The bill was accepted there, and it was there negotiated to the complainants, one of whom was a resident of New Orleans.

The testimony taken since the first hearing, renders it unnecessary for me to examine the interesting questions which were so ably argued, upon the nature of Luke Tiernan's liability according to the laws of Louisiana, and upon the adaptation of our local remedies to the exigencies of the obligations imposed by those laws.

Assuming that the acceptors of the bill are to be deemed jointly liable for its payment, as they would have been on its being drawn and accepted in this state; I cannot accede to the doctrine that the contract is to be considered *several in equity*, so far as to

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permit the creditor to proceed at once against the representatives of the deceased partner without first exhausting the legal remedy against the surviving partners, or showing that a resort to such remedy would be fruitless.

Our law confers upon the survivors the title to all the effects of the copartnership, and with it the burthen of paying the debts. It would therefore be oppressive in many cases, and unjust in still more, if the creditors were permitted to resort to the deceased partner's individual property for payment, leaving the primary fund for such payment in the possession of the surviving partners.

I am aware that in the case of *The Trustees of the Leake and Watts Orphan Asylum v. The Executors of Augustine H. Lawrence*, (MS. October 27, 1841,) my learned predecessor gave his assent to the recent English decisions of Sir John Leach and Lord Brougham, which were cited in support of the doctrine of an immediate several liability in equity.

But on the appeal in that case, the Chancellor adhered to the decisions in this country. He says, "The weight of authority, is in favor of the principle, that as the remedy at law survives, the creditor is bound to resort to his legal remedy against the surviving debtors, unless he can show some ground of necessity for coming into this court for relief against the estate of the deceased debtor." And he declares his opinion to be, that the estate of a deceased copartner or joint debtor in the hands of his personal representatives, cannot be reached by a suit in this court, without stating in the bill of complaint, a sufficient excuse for not proceeding at law against the surviving debtors to obtain payment. (Chancellor's Opinion, May 7, 1844, MS.; 5 Barbour's Abstract of Chancellor's Decisions, 17.)

With the additional testimony furnished to the court, the complainants have brought their case within the established rule as stated by the Chancellor.

The partners at the date of this acceptance were Luke Tiernan, Charles Tiernan, J. McGill Cuddy, and Calvin Tate. Luke T. died in 1839, and Cuddy in the summer of 1840.

The complainants proceeded in November, 1840, in the Commercial Court of New Orleans, against Charles Tiernan as the surviving and liquidating partner of the firm; (see Civil Code

of Louisiana, art. 1131 to 1135;) and recovered a judgment against him in that capacity, for the amount of the acceptance. On this judgment, an execution was issued, without effect; and after the present suit was commenced, another one was issued on which C. Tiernan says a small amount was collected. The lawyers who were examined as witnesses in Louisiana, testify that this judgment gave to the plaintiffs therein, the right to collect the amount from C. Tiernan individually, and out of the partnership property of Tiernan, Cuddy & Co. in his possession; and that such would be its effect though C. Tiernan had been previously appointed liquidator of the partnership concern and effects by the District Court.

C. Tiernan in his testimony speaks of himself as being such liquidator; but in another place he says he was appointed syndic by the court, on the application of a majority of the creditors. He once speaks as if he deemed liquidator and syndic as synonymous; and as there is no record evidence or reliable testimony produced to show that he was syndic, I shall have to assume that he was only the liquidator of the firm.

From the magnitude of this duty as disclosed in the proofs, it is probable that C. Tiernan spent most of his time in 1840 in Louisiana, although his residence was in Baltimore. At all events, I find neither allegation or proof that he had any property in Baltimore which the complainants could have reached by a suit at law in Maryland. Moreover the testimony is satisfactory that he was insolvent before November, 1840.

Thus it is shown that the remedy at law against the property of the firm, as well as against C. Tiernan, was tried and exhausted by the complainants.

It is also proved that Calvin Tate, the other surviving partner, became insolvent as early as 1839, and so continued until he was discharged under the bankrupt law in July, 1842. The complainants were therefore entitled to proceed in equity against the estate of the deceased partner, Luke Tiernan.

This brings me to the objections raised to their proceeding in the courts of this state.

Luke Tiernan resided and died in the state of Maryland. His

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executors reside there, and received their letters from the Orphans Court in that state.

No administration has been taken out in this state. One of the complainants resides in Baltimore, and the other in New Orleans.

But these facts, which were made so prominent at the hearing, are quite subordinate to the grounds upon which this suit really stands.

In September, 1839, Luke Tiernan was the owner in fee of a large tract of land in Western New York, for the sale of which Mr. Carroll, a resident of this state, had long been his agent. At that time L. Tiernan conveyed the land to Mr. Carroll; vesting him with the whole title, in trust; 1. to sell the same from time to time on certain terms specified, and to receive the proceeds of the sales. 2. To remit of the first net proceeds received, the sum of \$15,000 from time to time, to Alexander Neill of Baltimore, to be paid by the latter to L. Tiernan's creditors. 3. To remit \$12,000 of the ensuing net proceeds to Mrs. Tiernan, or her appointee, and next \$4450 for L. T. Brien; (which sums are undisputed obligations of Luke Tiernan's.) And 4. To remit all the residue of the proceeds of the sales to Mr. Neill, from time to time, to be applied by Neill to the payment of the debts due from Luke Tiernan. If the same proved insufficient to pay all his debts, then to be distributed rateably; and if there should be a surplus, Mr. Neill was to pay the same to L. Tiernan, his heirs, executors, administrators or assigns.

Under this trust deed, Mr. Carroll has sold a portion of the lands, and has remitted to Mr. Neill between eight and nine thousand dollars. Mr. Neill is one of the executors of Luke Tiernan, but he retains this remittance as receiver under the trust. He has nothing to do with it as executor.

Indeed, the executors have no interest or concern in the matter, except that on the improbable contingency of there being a surplus, they are entitled to receive it by force of the trust deed.

This is therefore, far from being a suit against the executors of L. Tiernan to compel them to pay this debt.

It is a suit by creditors of Tiernan, for whose benefit he has conveyed lands in this state to assignees, against those assignees, to have the assignment carried into effect. The non-residence of

the assignee who is made the sole distributor of the fund, does not affect the point of jurisdiction. The great mass of the fund is here. It is real estate, governed and to be disposed of, by our laws. The assignee who is to sell and convey it, and receive the price, resides here. Instead of there being any difficulty about the jurisdiction of this court, I do not perceive how any other court can administer this trust as against the principal trustee. The Court of Chancery in Maryland cannot reach or affect Mr. Carroll residing here, nor can their decree compel him to sell the lands or account for the proceeds.

But it is said that the legal representatives of L. Tiernan are necessary parties to a suit for closing the trust. As I have stated, there is a remote possibility of interest in those representatives, and this renders it proper that they should be made parties. I am not prepared to say that it would be held indispensable, in a case where the assignor was dead, and the bill charged that his estate was all assigned, and was hopelessly insolvent.

In this case the executors are not necessary parties in respect of the sale of the property, or the distribution of the trust fund to the creditors. The trust deed devolves the one duty upon Mr. Carroll and the other upon Mr. Neill; and it is through and by the latter, and not the executors, that a court of equity, whether here or in Maryland, would effect such distribution.

This being so, and there being an express direction in the assignment, to remit to Mr. Neill the surplus, as well as the fund designed for the payment of debts; would not the Court of Chancery here sufficiently discharge its duty, by ordering such surplus to be transmitted to Mr. Neill, or to be left in his hands, after providing for the demands of the creditors? Another mode open for its adoption, is to bring such surplus into court.

Without relying wholly upon this ground, I am satisfied that in view of all the circumstances, this court is warranted in proceeding with the parties who are now defendants.

It is agreed on all hands, that the two defendants who are described as executors of L. Tiernan, are such executors; appointed by his last will and testament, and duly qualified by the probate court having jurisdiction at the place of his domicil. They are therefore, the chief and principal legal representatives. If an ad-

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ministrator were appointed here, his functions would be ancillary and subsidiary to those of the defendants. It not only appears to the court that Messrs. Neill and Somerville, are the persons to whom in the due execution of the trust, the surplus must be paid; but Mr. Neill the executor and Mr. Neill the trustee, are one and the same person.

If the distributing trustee were not also an executor, and resided elsewhere than in Maryland, yet his voluntary payment of the surplus to the executors there, would be a compliance with his trust and a valid discharge. And if such payment were brought into question in this state, our courts would recognize the office of such executors, and their right to receive the surplus.

We do not, it is true, permit foreign executors to sue here in their representative capacity; but suits against them for acts done in that capacity, are sometimes entertained.

In *McNamara v. Dwyer*, (7 Paige, 239,) the Chancellor sustained a suit for an account against a foreign executor, on principles which will amply sustain this bill. Here the executors have appeared, so that the suit is not liable to the objection of its proceeding in default of jurisdiction of their persons.

The trust in question being for the benefit of creditors generally, a non-resident creditor is as much entitled to file a bill to enforce it, as a creditor residing here.

The circumstance that one of these creditors resides in Baltimore, would have weight in determining whether the account and distribution should take place here, or should be remitted to Baltimore, provided this were a case of ancillary administration. (*Harvey v. Richards*, 1 Mason's R. 380.)

But this is a trust, in which the fund is here; and here is the principal trustee. The Court of Chancery in this state, has jurisdiction over the subject matter, more appropriately and effectually than any court in another state can have. If the decree should direct a sale of the lands and a transmission of the funds to Mr. Neill, but half its duty to the creditors would be discharged; for in order to compel him to proceed and distribute the fund, they would have to institute another suit against him in the equity courts of Maryland.

As to the argument of inconvenience derived from the domicil

of the debtor and the residence of the creditors, it is not decisive. The decree can be so framed and executed, as to enable creditors in Maryland to be notified as effectually, (so far as publication can give notice,) and to prove their debts with nearly as little expense, as if it were made in the courts of that state. While in point of fact, judging from the lists of the creditors of Tiernan, Cuddy & Co., the greater part of L. Tiernan's debts are due to persons in and about New Orleans; and such persons would be more likely to receive notice, by way of advertisement, if the accounting were conducted in New York than they would if it were conducted in Baltimore, with equal convenience for proving their demands. The only advantage which occurs to me in favor of the Maryland forum is this, that creditors probably have placed their demands in the hands of agents in that state, in order to have them presented to the executors; and those agents would be more likely to learn of a proceeding for an account against these trustees if it were conducted there, than they would if it were conducted here. But this may be obviated in a great measure by suitable directions in the decree of this court.

And as there should be but one accounting of both of these trustees, and one of them resides in this state; it is my conclusion that such accounting and the consequent distribution ought to be made here.

There is no difficulty in this case growing out of different rules for distribution among the creditors of decedents, prevailing in Maryland, from those which are enforced in this state. The trust deed is the guide for the distribution; and the rule it prescribes, is that of entire equality. It being a trust for the sale of lands in this state, any direction repugnant to our law would have rendered it voidable by the creditors.

It was suggested at the hearing that there was no ground for proceeding against Mr. Carroll the trustee; and that the court ought not to interfere to expedite the closing of the trust contrary to the intent of L. Tiernan in creating it.

As to Mr. Carroll, the bill makes no charge of neglect of duty against him, nor is any imputed by a decree.

As to hastening the sale of the lands, there is no doubt of its propriety, or of the right of the court to direct it. Any specific

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direction to the contrary made by an insolvent debtor in such an assignment, would subject it to the charge of an intent to delay and defraud creditors.

A decree for a sale will not impair the rights of the trustee. It effects in behalf of the creditors, what L. Tiernan should have directed in his assignment, and precisely what would have been accomplished ere this by due process of law, if no conveyance in trust had been made.

There must be a decree establishing the complainants debt as against the trustees and the fund; and directing a sale of the lands and a conversion of the trust assets.

And the usual provisions, together with special clauses will be inserted for bringing in all the creditors, passing the accounts of the trustees, and distributing the fund. The surplus, if there be any, to be paid to Mr. Neill as trustee. If, however, his co-executor desires that it should be paid to the executors, such will be the decree.

J. COATS and others v. HOLBROOK, NELSON & Co.

No person has a right to use the names, marks, letters or other symbols, which another has previously got up or been accustomed to use, in his trade, business or manufactures.

Equity will restrain such deceptive and fraudulent use of trade marks, by injunction, and will decree an account for damages.

It is no answer to the suit, that the simulated article is equal in quality to the genuine manufacture.

Nor that the maker of the spurious goods, or the jobber who sells them to the retailers, informs those who purchase, that the article is spurious or an imitation.

A commission merchant who sells the spurious article, knowing its character, is liable to a suit to restrain its further sale by the proprietor of the trade mark, and will be subjected to the costs of such suit.

The alienage of the person whose trade marks are simulated, and his residence in a foreign country, do not affect his right to their exclusive use, when he has introduced them here.^(a)

April 17; July 24, 1845.

(a) The great importance of the subject of trade marks and symbols, and the growing interest which it has excited, have induced the author to collect in a note

Coats v. Holbrook.

THE bill in this cause was filed on the 30th of July, 1844, by James, Peter and Thomas Coats, manufacturers, constituting the firm of J. & P. Coats of Paisley in Scotland; against L. Holbrook, T. S. Nelson and W. E. Shepard, commission merchants in the city of New York, trading under the name of Holbrook, Nelson & Co.

The bill stated that the complainants for several years, have been the manufacturers and sellers of spool cotton thread used for sewing, and have forwarded the same to their agents for sale in the city and state of New York, and elsewhere in the United States, where they have resident agents to make sales, and to protect their rights. That they have for years dealt in such thread in New York and elsewhere in the United States, and their sales have been very great. That with a view to make an honest and superior article of thread, they have gone to an expense of upwards of \$70,000 upon machinery; and they have succeeded in making their thread a first rate article in the American market, as well as to its quality and goodness, as to the fairness of the alleged quantity or length at which it is advertised to be sold. No thread in the market sells higher or more readily, and for a long time it has been well known publicly, as well as to the principal dealers. That manufacturers of thread designate the fineness and the number of cords or strands used in making it, by numbers; the lower numbers indicating the coarser kinds, and the higher numbers the finer quality and larger number of strands. The complainants thread as numbered from 8 to 40, are threads of six

at the end of this case, the recent authorities relative to this branch of the law, both here and in England. Since the decision of *Coats v. Holbrook*, the case of *Taylor v. Carpenter*, cited in the opinion of the court, has been decided, on an appeal from the Chancellor's decree, in our court of last resort; so that several of the propositions held in the case of *Coats*, are now definitively settled in this state. The note appended, contains a full report of *Taylor v. Carpenter*, both in the Court of Chancery, and in the Court for the Correction of Errors. It also contains a report of a very recent trade mark case, first decided by Vice-Chancellor Sandford, and his order affirmed on appeal by Chancellor Walworth, on the 25th of January, 1847.

The great interest felt in these questions by the manufacturing and commercial world, is illustrated by the fact, that the judgment of the Assistant Vice-Chancellor in *Coats v. Holbrook*, was noticed at some length in the London Times soon after it was pronounced, and was stated at large in the Liverpool newspapers.

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cords, while those from 40 to 70 are of four cords, and from 70 to 150, are threads of three cords. Their thread when made, is wound on wooden spools or reels, each spool containing a length of 200 yards. At the end of each spool, a circular paper label in black and gilt is put on before the thread is ready for sale, and is on it when sold. The label contains the words "J. & P. Coats Best Six Cord," on the outer edge of the circle, and within those words, the letters, &c., "200" Yds.," and "20," or such other number as the quality of the thread requires; and these marks distinguish their thread from that of other manufacturers, and has been and is known as such to the public. That the spools when labelled, are put up in quantities of twelve, in drab or brownish paper wrappers, each parcel being tied with a twine, and having on its outside a label like that before described, and also an engraving or cut, representing three shields together with a lion and an eagle as supporters, with the following printed under the same; "BEST SIX CORD SPOOL COTTON. J. & P. COATS. WARRANTED 200 YARDS."

The bill further stated, that finding a spurious and inferior article of thread, bearing a forged label and impression on the wrapper, of the character, style and firm name used by the complainants, had been secretly brought into the market and largely sold in the city of New York, and other parts of the United States, as the thread so made by them; the complainants by their agent resident in that city, set about tracing out the wrongdoers, and at length found a retail merchant who had bought the spurious article of a jobber in Cedar street, named Hazleton. That Hazleton, when called upon, gave Holbrook, Nelson & Co. as the venders of the article to him. That the latter firm have for some time been selling and continue to sell a spurious article of cotton thread on spool or reel, as and for the complainants thread, well knowing it is spurious. That the thread which they are thus selling is put up on spools, with a label at each end, with the complainants firm name thereon, and in other respects similar to theirs, and the spools put in wrappers similar to those used by the complainants, and having a similar cut or engraving and similar words printed under it. (The complainants attached to their bill, specimens of the genuine labels put on the

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ends of their spools; and of the genuine wrappers used upon the parcels when put up in dozens, with the cut or engraving and printed letters and figures. They also attached specimens of the spurious labels and wrappers put upon the thread sold by the defendants. The latter were an exact imitation of the former in the letters and figures printed, and in the general appearance, color, &c. of the label and the cut or engraving, but the cut itself was not as finished as that on the genuine wrappers. The number on the specimen attached was 35.) The bill further alleged that the defendants well knew that the complainants were such manufacturers and venders of the thread known as J. & P. Coats's, as charged in the bill. That with a fraudulent design to put off an inferior or spurious article, by that means to draw away the customers the latter would otherwise enjoy in the sale of their thread, the defendants have knowingly sold such inferior or spurious thread in large quantities to Hazleton and to others, with a view to have it again sold by jobbers and retailers, so that the same might be fraudulently palmed upon and bought by persons requiring the complainants thread, as the genuine article so manufactured and sold by them. That the spurious label as well as wrapper, state or show or would give a buyer to believe, that the thread is one made from or with six cords, and that the quantity on each spool ran or measured to the length of two hundred yards; but in proof of such fraud or cheating, the spurious thread is only made with three cords or strands, and was only about one hundred and fifty yards in length on each spool. That the defendants have sold large quantities of this article as the original article so made and sold by the complainants; and if they are not the makers of it, they know who are or is the maker and getter up of the spurious article and of the cut and label, and the engraver and printer thereof; and the bill claimed a discovery in these particulars.

That the complainants were the first to use publicly in selling their thread in the United States, the label and wrapper before described. That their price has been and is 45 cents a dozen for cash, and 47½ cents a dozen at eight months credit; whereas the spurious article coming from the defendants is selling from 25 to 37½ cents a dozen. And the complainants have suffered

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serious injury in consequence of such fraudulent conduct of the defendants.

The bill prayed for a full and minute discovery ; that the defendants might account for all the profits made by the sale of the spurious thread, and compelled to deliver up to be destroyed, all that remained in their hands, as well as all the labels and wrappers, and plates, blocks, types and dies for printing the same ; and for a preliminary and a perpetual injunction against the further sale or use of the spurious thread and the counterfeit labels and wrappers ; and that the defendants pay the costs of the suit.

The answer admitted the material allegations of this bill as to the complainants manufacture and sale of the Coats thread, and its trade marks, standing and character, and of their being the first to use such marks ; upon information derived by the defendants since the bill was filed. They stated that their business is selling domestic goods on commission. That on the 28th of May, 1844, one Malcolm McGregor, of Newark, in the state of New Jersey, a manufacturer of cotton thread, sent to them to sell for his account, on commission two cases, each containing one hundred dozen spools or reels of cotton thread. The spools were labelled like those stated in the bill, and when received and when sold, were put up in quantities of twelve, in yellow paper wrappers, tied with twine and labelled on each side with labels like those on the spools, but not having any cut or engraving thereon. Shepard, one of the defendants, in two days afterwards, sold the two cases to D. G. Hazleton at the price of $27\frac{1}{2}$ cents per dozen, payable in thirty days. In July, Shepard received from McGregor, two more cases of the same thread. Of these, one hundred and fifty dozen were in wrappers like those first sent, and fifty dozen were in drab or brownish wrappers, with a cut or engraving, being such wrappers as are described in, and one of which is annexed to the bill. These cases were sold to Hazleton at $37\frac{1}{2}$ cents per dozen on a credit of eight months. The defendants also received with the first cases, a few sample spools which have not been sold. With these exceptions, they have never manufactured, sold, or had in their possession, any cotton thread purporting to be made or manufactured by the complainants, or having like names, marks or wrappers. On Hazleton's

calling on them, after the agent of the complainants had visited him, they authorized him to furnish their names as the sellers to the agent; but the latter never called on them, or made any complaint, or requested them to desist from selling. Shepard knew the thread he received was manufactured by McGregor; but neither he or they, ever sold any of it, professing it to be the complainants' thread or made by them, or sold any with a design to put off an inferior or spurious article, or to draw away their custom, or to palm off the thread as the genuine article. On the contrary, Shepard sold it to Hazleton informing him it was an imitation article made in this country, and he sold it as a thread made of three strands. He supposed the spools to run each two hundred yards in length of the thread, until since the bill was filed. On measuring one of the spools since, it was found to run one hundred and ninety yards. McGregor was the sole maker and getter up of the article of thread which they sold. They are informed that he procured an engraver in Boston to prepare the plate for the cuts and labels.

The defendants denied all fraudulent conduct, as well as the alleged injury to the complainants from their acts. They would have desisted at once, if they had been informed of the complainants' rights and been requested to desist. They never had in their possession any of the cuts, engravings or labels, except those on the thread received from McGregor; nor any of the dies, plates, blocks or cuts.

The answer then set forth the defendants' offer after the bill was filed, accompanied with a statement of their connection with the matter, to pay to the complainants' agent the commissions they had received on the sales, to deliver up the sample spools on hand, to pay the complainants' costs, and to promise in writing never to receive or sell any more of such thread; provided this suit should be discontinued; which offer was declined, the agent requiring an answer to be put in to the bill.

The answer alleged that no one of the complainants is a citizen or a resident of the United States, but they are all subjects of the Queen of Great Britain and Ireland.

The defendants examined Hazleton as a witness who testified that he bought the thread of them as an imitation or a spurious

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article, and never sold it except in the same manner. Shepard told him it was an imitation of Coats's thread, was only of three cords, and he would not warrant its length.

It was put up in wrappers with labels and an engraving as stated in the bill. Shepard offered to sell the witness a large quantity after his first purchase, but at a higher price. The price then came near to Coats's, and that, with the loss of reputation in selling a spurious article, weighed in his opinion against the transaction. He sold nearly all he received, by the case of a hundred dozens.

Charles Edwards, for the complainants, made the following points.

I. The complainants are entitled to a perpetual injunction.

II. The defendants knowingly dealt in the spurious article, and were ready to furnish large quantities. They must pay full costs.

III. The decree should be for a perpetual injunction and costs of suit, with liberty, should the complainants require it, to have a reference to a master to ascertain and report the amount of their damages, and a decree that the defendants pay the amount of such damages, upon the coming in and confirmation of the master's report. (*Taylor v. Carpenter*, MS.):

Mr. Edwards cited, *Blanchard v. Hill*, (2 Atk. 484;) *Knott v. Morgan*, (2 Keen's R. 213;) *Ransom v. Bentall*, (3 Law Journal Rep. N. S. part 2d, p. 161;) *Gout v. Parkinson*, (5 London Legal Observer, 496, 1833;) *Sykes v. Sykes*, (3 B. & C. 541; S. C. 5 Dowl. & Ryl. 292;) *Taylor v. Carpenter*, before Judge Story, MS. and in 7 Law Reporter, 437; and case with the same title before Chancellor Walworth.

J. Butler Wright, and *J. Angus Manning*, for the defendants, made the following points.

I. The material allegations of the bill of complaint are shown to be untrue. The bill should therefore be dismissed with costs.

1st. It appears that the defendants have not used the trade marks of the complainants. Because the defendants did not manufacture the thread which was sold by them. They sold it

merely in the ordinary course of their business as domestic commission merchants, having no interest in the sale excepting the usual commission. Defendants might have moved upon the answer for a dissolution of the injunction.

2. The facts and circumstances attending the sale by defendants, affirmatively show their perfect good faith in the transaction. It appears that the purchaser was truly told that the thread sold was a domestic article manufactured in New Jersey. Whilst the bill charges that the defendants had made large sales of a spurious article, falsely and fraudulently representing the same to have been manufactured by the complainants. Fraud is the basis of the bill, and the charge of fraud wholly fails. Complainants have failed to show such a user, much less a fraudulent user of the trade marks, the gist of the whole complaint.

3. The complainants have failed to show a continued intention on the part of the defendants, to make further sales. This in any case, would be necessary proof to entitle them to a perpetual injunction.

II. Even though a perpetual injunction should be granted, the decree will be on payment of the defendants costs.

1. The complainants should have inquired of the defendants for the information to be discovered before the filing of the bill.

2. The defendants are involved in a litigation entirely unnecessary.

3. Costs in a chancery suit rest in the sound discretion of the court upon a view of all the circumstances of the case.

III. The prayer for a receiver must be denied because the sum which the complainants under any view of the case would be entitled on taking the account, is so small that the court would consider it an abuse of its jurisdiction to bring the cause to a hearing for such a paltry sum.

IV. In any event, the defendants should be allowed the costs subsequent to the time when they offered to do every thing which the complainants in their bill of complaint ask for.

Messrs. Wright and Manning, cited *Millington v. Fox*, (3 Mylne & C. 338;) *Townsend v. Lawrence*, (9 Wend. 458;) *Eastburn v. Kirk*, (2 J. C. R. 317.)

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THE ASSISTANT VICE-CHANCELLOR.—The principles applicable to this case are well settled.

A man is not to sell the goods or manufactures of B., under the show or pretence that they are the goods or manufactures of A., who by superior skill or industry has established the reputation of his articles in the market. The law will permit no person to practice a deception of that kind, or to use the means which contribute to effect it. He has no right, and he will not be allowed, to use the names, letters, marks, or other symbols by which he may palm off upon buyers as the manufactures of another, the article he is selling; and thereby attract to himself the patronage that without such deceptive use of such names, &c., would have enured to the benefit of that other person who first got up, or was alone accustomed to use such names, marks, letters or symbols.

One of the earliest cases reported in full is *Gout v. Aleplogu*, (6 Beav. 69, note, and 1 Chitty's Gen. Pr. 721.) Gout had been in the habit of manufacturing watches for the Turkish market, where they were known by the marks engraved on them, and had acquired great repute. The marks were on the inside of the watch, and consisted of his name in Turkish characters, and the Turkish word "*Pessendede*," which signifies *warranted* or *approved*. There was also "*R. G.*" and a crescent put in relief, and a sprig and crescent.

The defendant procured Parkinson to make watches for him, and had engraved on the same part of the watch as Gout was accustomed to do, the words "*Ralph Gout*" and "*Pessendede*" in Turkish characters; which watches the defendant consigned to Constantinople and sold there to the prejudice of the complainant's trade. Vice-Chancellor Shadwell granted an injunction restraining Aleplogu from sending or permitting to go to Constantinople or Turkey, or to any other place, and from selling and disposing of any watches with Gout's name, or the word "*Pessendede*," thereon in Turkish characters, or any watches in imitation of Gout's watches; and also restraining the defendant and Parkinson from manufacturing or vending such watches.

A similar decision was made in the plough case, *Ransome v. Bentall*, before the Vice-Chancellor, (3 Law Journal Rep. N. S.

161,) and the omnibus case, (2 Keen's R. 213,) *Knott v. Morgan*, before Lord Langdale, Master of the Rolls; and Day & Martiu's blacking, *Day v. Binning*, (1 Coop. Ch. R. 489,) V. C. Shadwell.

Another in an action at law for damages, will be found in *Sykes v. Sykes*, (3 B. & Cres. 541,) where the manufacture simulated was shot belts and powder flasks, stamped "*Sykes' Patent*."

And in *Millington v. Fox*, (3 Mylne & Cr. 348,) the principle was sustained by Lord Cottenham, in a suit relative to the "*Crowley*" steel.

In *Taylor v. Carpenter*, before the Chancellor, decided on the merits, December 3, 1844, (4 Barbour's Abstract of Chancellor's Decisions, 68,) I prepared the bill as counsel. The complainants, residing in England, had long been the manufacturers of cotton thread, known as "*Taylor's Persian Thread*," which had acquired an extensive and valuable reputation in the United States, where they sold large quantities of it. Their thread was put up upon spools, with a printed paper label on each end of the spool, and a certain number of the spools were placed in a paper envelope which was stamped with the name of the thread. The defendant had commenced the manufacture in Massachusetts of a simulated Taylor's Persian Thread, and had introduced it into the city of New York for sale. His imitation extended to the appearance and color of the spools and paper labels and envelopes, as well as the use of the name and title of the thread. In his defence, the defendant insisted that his manufacture was equal in quantity and value to the genuine article; and that the complainants were subjects of a foreign government, and that he as a citizen of the United States had a right to use the marks and names in question.

The Chancellor held that the quality of the imitation was immaterial, and that the alienage of the complainants did not alter their rights. And he decreed a perpetual injunction with costs, together with an account as to damages.^(a)

A suit between the same parties, soon after the filing of the bill

^(a) This case is reported more at large in a note at the end of the opinion.

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here, was instituted in the Circuit Court of the United States, in Massachusetts, on the equity side of the court. Judge Story sustained an injunction, granted on filing the bill.

The defendant put in an answer and proofs were taken, upon which the cause came to a hearing before the same eminent judge, in November, 1844. The answer admitted the imitation of Taylor's black spools and their stamped envelopes, but alleged that the defendant had never sold any of his manufacture as *genuine* Taylor's thread, nor without informing purchasers that they were of his own manufacture; and it set up that the Taylor's were aliens, and that the defendants were not accountable to any foreign manufacturer, for using in this country the names, trade marks, &c., of such manufacturer. The answer also alleged that the defendant's thread was equal in quantity and quality to Taylor's. It was also set up that other persons were engaged in imitating the complainant's names, spools and labels. The proofs disclosed that the defendant had imitated and sold both the red and black spools and labels.

Judge Story, in a pointed opinion, (with a copy of which I have been furnished,) scouted these various grounds of defence, and decreed a perpetual injunction, with the costs of the suit. (*Taylor v. Carpenter*, defectively reported in 7 Law Reporter, 437.)

The legislature of this state has recently declared its reprobation of this kind of piracy, in the "Act to punish and prevent frauds in the use of false stamps and labels," passed May 14, 1845. (Laws of 1845, chap. 279, page 304.) This act makes it an offence punishable by fine and imprisonment, either to counterfeit such stamps or labels with intent to defraud, or to vend goods, &c. thus stamped, without disclosing the fact to the purchaser.

In this case the attempted imposition upon the public by the manufacturer of the simulated article, is too barefaced to be questioned.

The defendants are merely vendors of the spurious goods, and they suppose that they are, on various grounds, exempted from the consequences which would be visited upon the manufacturer. Thus it is said that they have not used the trade marks of the

complainants, that they merely sold for McGregor on commission in the usual course of their business, and have acted in perfect good faith. Indeed, they go so far as to say in their answer, that they had no information of the complainants rights, or of their manufacturing Coats's thread, until after the defendants had sold for McGregor. How this could be true of the defendant, who sold McGregor's thread as *an imitation article made in this country*, (such is the statement in the answer,) I cannot understand.

Then as to the good faith and morality of the transaction ; and in all that I have to say, I refer to the defendant who alone acted in the sales. The defendants received for sale from McGregor, an imitation thread, carefully put up, labelled and stamped, as thread made by J. & P. Coats. They probably knew that there was such a house as J. & P. Coats who made the genuine thread. If they did not, they knew perfectly well that some person other than McGregor, made such genuine thread, that it was called "Coats's," and it was in high repute in this market. They therefore knew that the article they were selling was spurious ; that it was going out to the public under false and deceptive colors, and was designed and well calculated to take in purchasers who were in pursuit of the genuine thread. They admit that they knew it was only a three cord thread, although it was stamped and labelled "*J. & P. Coats Best Six Cord.*"

Knowing all these things, they sold it, and so far as they could, put it in the way of imposing upon and swindling the community.

But it is said that upon their sale to the jobber, by whom it was to be again sold to the retailer, the defendants told the jobber, truly, that it was an imitation of Coats's thread ; in short that they sold it as a spurious article. But what then ? Did they imagine that the jobber would be equally frank and communicative to the retail merchants and shopkeepers, and that every one of the latter would carefully inform every customer who bought a spool, that the thread was an imitation of Coats's, made in New Jersey, and only three cord instead of six ?

The idea is preposterous. Trade marks, names, labels, &c. are not forged, counterfeited or imitated, with any such honest

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design or expectation. McGregor's thread was labelled and stamped with Coats's name and marks, so that it might be palmed off upon the consumer as being made by Coats. And every man who sold it, whether he made five per cent. or fifty per cent. by the operation, lent himself to the perpetration of the fraud.

I have looked into the point of good faith in reference to costs, and not because I deemed it to be of any consequence in respect of the injunction. (See *Millington v. Fox*, above cited.)

The question of costs remains to be disposed of. There was no occasion for the complainants to apply to the defendants before filing their bill. They found the latter participating in a gross violation of their rights, under circumstances where it was not supposable that the defendants were ignorant of the wrong. The same consideration shows that the litigation cannot be deemed to have been unnecessary.

The costs subsequent to the bill and injunction, stand upon a somewhat different footing from the others.

The defendants had disclosed the manufacturer to the complainants agent, and offered to give up their profits on the sale, to pay the costs up to that time, and to stipulate in writing not to sell any more of the spurious thread.

If it had turned out that they were ignorant of the spuriousness of the thread which they sold, the case would have been within the opinion expressed by Lord Cottenham in *Millington v. Fox*, and I think they would have been relieved from the subsequent costs. But the offer was not made till about the time the answer was due; in fact, it was on the day the answer was filed. It was not accompanied with a proffer of a perpetual injunction, to which the complainants were entitled, and for which the proposed stipulation was not a reasonable substitute; but it required the bill to be dismissed.

And finally, it turns out by the answer, that the defendants were not guiltless of abetting McGregor's fraud. I cannot under these circumstances, relieve them from any part of the costs.

Decree for a perpetual injunction, and the costs of suit.

NOTE.

Before giving the report of *Taylor v. Carpenter*, and *Partridge v. Menck*, as promised at the head of this case, the note will contain the recent English decisions stated in brief, as also two or three of an earlier date.

In *Lewis v. Langdon*, (7 Simons, 421,) the question arose on the use of a partnership name, as a trade mark, after a dissolution by the death of one of the two partners. One of the executors of the deceased, commenced the use of the firm name as such trade mark; the survivor with a new partner, continuing its use as formerly. On a bill filed by the survivor and his new partner against the executor, Vice Chancellor Shadwell on motion, granted an injunction restraining the latter from using the name of the late firm in carrying on his business.

In *Pidding v. How*, (8 Simons, 477,) where the bill was filed to restrain the use of a trade mark on tea, called "Howqua's Mixture," the court, on the ground that the complainant was shown to have used false representations to the public about the mode of procuring and making up his mixture, refused to allow an injunction until he should establish his title at law. At the same time, the Vice-Chancellor said the defendant was not at liberty to make and sell a mixture of his own, under the same designation as the plaintiff had appropriated.

A similar decision was made by Lord Langdale, Master of the Rolls, in *Perry v. Truefitt*, (6 Beavan, 66,) relative to the "Mexican Balm for the Hair;" because the complainant in his labels and cards, described his own article as having been prepared from an original receipt of the learned Von Blumenbach; when in truth, its inventor was a man of a much less sounding name, and of no note at all.

In *Croft v. Day*, (7 Beavan, 84,) the "Day & Martin Blacking," which figured in Cooper's Rep. 489, again came before the court. The genuine blacking was put up in bottles with a label, &c., containing as the place of manufacture "97 High Holborn," and the article was made by the executors of the surviving partner of Day & Martin, who continued the business in their name. The defendant, Day, a nephew of the testator, associated with a person named Martin, and set up a blacking manufactory, using the old firm name, and labelling their bottles in a manner closely resembling those of the old establishment. In the cut on the label, they however substituted the royal arms for those of the original firm, and inserted "90½ Holborn Hill," in the place of "97

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High Holborn." Lord Langdale said the defendants contrivances were calculated to mislead the bulk of the unwary public, into the impression that the new concern was connected with the old manufactory ; and thus to benefit the defendant, to injure the plaintiff, and to deceive the public ; and he therefore directed an injunction to issue.

Much like the principal case in the text, is the very recent decision in *Pierce v. Franks*, before Sir Knight Bruce, V. C. January 18, 1846 ; (15 Law Journal, Chy. Rep. N. S. 122 ; S. C. 10 London Jur. Rep. 25.) There the complainant was in the habit of selling tooth brushes and nail brushes on which were stamped "Smyth's Bond Street," that being the trade mark to which he was entitled ; and they also had stamped on them certain figures and letters which were his private marks, and were used to distinguish the different sizes and patterns. The bill alleged that the defendant made and sold brushes which were stamped with the same words and the same private trade marks. An injunction was granted, restraining the defendant from selling brushes on which "Smyth's Bond Street," were stamped.

In his answer the defendant stated he had made such brushes to fill two orders only, both of which he then believed were given by the complainant's agent ; he had no wish or intention to use the complainant's marks without his consent, or to his injury ; and that if the complainant had applied to him he would have desisted, and undertaken not to use the trade marks, and no bill was necessary. He denied that the private marks were the complainant's and alleged they were generally used in the trade. And he insisted that the suit was vexatious, and that he ought to have his costs. The cause was heard on bill and answer. The court decreed a perpetual injunction, and charged the defendant with the costs of the suit, except such as were occasioned by the allegation as to the private marks.

Cotemporary with the last, is *Hine v. Lart*, decided by Vice-Chancellor Shadwell, January 12, 1846, (10 London Jur. Rep. 106.) The complainants claimed a right to a trade mark in the word "Ethiopian," upon black cotton stockings, with certain black lines above it, as having been acquired by them and a former partner deceased. They alleged a violation of their rights by the defendants, in the use of the same marks in fraudulent imitation of the complainants, and they prayed for an injunction and an account of profits. The answer denied the complainants' right to the trade mark, alleging that other parties used it before they or their former partner did ; but the defendants admitted that they had manufactured stockings largely, with the same marks, which

were in imitation of or a copy from those which the complainants claimed. The answer stated that the defendants so used it without any intention to defraud or injure the complainants, or of passing them off as the manufacture of the latter. Affidavits were filed on both sides, respecting the complainants right to the trade marks, which were very contradictory.

The Vice-Chancellor said that it might be that the personal representatives of the complainants deceased partner might have a right to use the same mark, but that the complainants had sufficient right to bring forward the case, whether the title was in them alone, or jointly with the representative. That it was evident from the defendants making so perfect an imitation of the complainants marks as they had done, the difference being merely nominal ; (although they claimed to think the complainants had no beneficial right to the mark ;) that they knew they might gain an advantage by it, to which they were not entitled. He refused to dissolve the injunction, and directed the complainants to bring an action at law to try their right to the trade mark.

Some cases in the courts of law, will now be mentioned.

In *Blofeld v. Payne*, (4 Barn. & Adolph. 410,) in an action on the case, the plaintiff was the manufacturer of a metallic hone for sharpening razors, which he was accustomed to wrap up in certain envelopes containing directions for its use and other matters ; the same being intended and serving to distinguish his hones from those of other persons. It appeared on the trial, that the defendants had obtained some of the plaintiff's wrappers, and used them wrongfully upon hones of their own manufacture, and sold such hones as and for the plaintiff's, for their own gain. No proof was given of any actual damage to the plaintiff. The jury found for the plaintiff with one farthing damages, and stated that they thought the defendants hones were not inferior to the plaintiff's. The defendants then moved at bar for a nonsuit, but the court held that the plaintiff was entitled to recover some damages, by reason of the fraudulent use of his wrappers, and refused to grant a rule to show cause. The case decides that it is no answer to such a suit, to show that the simulated article is as good as the genuine manufacture.

Morison v. Salmon, (2 Mann. & Grang. 385,) was an action on the case for damages by reason of the pirating of a medicine called "Morison's Universal Medicine," which the plaintiffs claimed to have prepared and sold for profit for many years, put up in boxes with a label thereon as above ; and which had acquired great fame and reputation with the public. The defendant, it was alleged, intending to injure the

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plaintiffs, had fraudulently prepared and sold medicines in imitation of theirs, put up and labelled in the same manner, in order to denote that his was the genuine medicine prepared and sold by the plaintiffs, and that the defendant fraudulently sold such imitation for his own lucre and gain. After a trial on a plea of not guilty, where the plaintiffs recovered a verdict; the defendant moved in arrest of judgment. The Court of Common Pleas denied the motion, on the ground that the declaration disclosed a false representation in this, that the defendant sold the medicines made by him as and for those made by the plaintiffs.

Crawshay v. Thompson, (4 *ibid.* 357,) was an action on the case, in the same court, for using the plaintiff's trade mark on bars of iron; both of the parties being iron manufacturers and exporters. The defendants had a verdict, and on a motion for a new trial, it was held, that it was properly left to the jury under the pleadings in that cause, to say whether the defendants mark bore so close a resemblance to the plaintiff's as was calculated to deceive the unwary, and to injure the sale of the plaintiff's goods; and secondly, whether the defendants used the mark with the intention of supplanting the plaintiff, or whether it was done in the ordinary course of business in execution of orders, without such intent. Also, that the notice of the resemblance of the mark, given by the plaintiff to the defendants, did not *in the absence of proof of any intention to imitate it* on the part of the defendants, give the plaintiff any cause of action; it being expressly alleged in the declaration that the defendants *knowingly* used it in imitation of the plaintiff's mark.

This allegation was held to be material by two of the three judges, who delivered their opinions at large.

Coltman, J. said "if there was such a similarity as might impose on ordinary persons, and it was shown that it was calculated to mislead, the plaintiff would have been entitled to a verdict; for the intention to deceive would have been manifest."

Maule, J. said "the gist of the action is the selling of the defendants manufacture, as and for iron of the plaintiff's manufacture; and it would be sustained by proof that the defendants had sold their iron to their correspondents, for the purpose of being retailed as the plaintiff's manufacture." He then mentioned the express *scienter* alleged in the declaration, and remarked that he thought the declaration would have been good without that allegation. He further said, that the first question submitted to the jury was in effect, whether the iron made by the defendants was made so as to imitate the iron of the plaintiff; and that it was a material question. As to the defendants

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purpose to supplant the plaintiff in the market, or whether their acts were done in the ordinary course of business and merely in execution of foreign orders sent to their house; he said "it was equivalent to putting the question whether they had sold their iron as and for the plaintiff's; because if they had done so, it would have a natural tendency to supplant the plaintiff in the market, and then the intention to defraud would follow as a matter of law, as well as of common sense." The judge agreed that if the defendants sold their iron as and for the plaintiff's, they were liable, whatever may have been their motive in so doing.

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There is no difference between citizens and aliens, in respect of their rights in trade marks, or their claim to have such rights protected in our courts.

The court of chancery will grant an injunction against the unauthorized use of a manufacturer's or vender's trade marks, and will decree the payment of the damages sustained thereby.

Where one intentionally uses or closely imitates another's trade marks, on merchandize or manufactures, the law presumes it to have been done for the fraudulent purposes of inducing the public, or those dealing in the article, to believe that the goods are those made or sold by the latter, and of supplanting him in the good will of his trade or business.

And in such a case, it is wholly immaterial whether the simulated article is, or is not, of equal goodness and value with the genuine manufacture.

The right thus protected does not partake of the nature and character of a patent or copy-right. Per Spencer, Senator.

The defendant who is found to have pirated trade marks, must pay the costs of suit.

The venders of an article of trade or manufacture, who have established or become entitled to a particular trade mark which they use, to distinguish such article, are entitled to be protected in its use, although they do not manufacture the goods. Per Lott, Senator, and so adjudged.

The protection of trade marks is among the highest incentives to ingenuity, exertion and fidelity, and one of the greatest securities to the public against imposition. Per Spencer, Senator.

Where on an appeal, the decree below appears to have been made on "the cause being brought to a hearing on the pleadings therein, upon a motion to dissolve the injunction issued in the cause," after a replication has been filed, and it also appears that there were no proofs; the appellate court will presume that the hearing below was regular, by consent or otherwise, and that the decree was made in due form. If it were irregular, the party complaining should move for redress in the court below.

Decided, Dec. 30, 1846.

Coats v. Holbrook.—Taylor v. Carpenter.

THE bill was filed before the Chancellor, by John Taylor and William Taylor against Daniels Carpenter, in March, 1843. The stating part of the bill was in these words.

"Humbly complaining—show unto your honor your orators, John Taylor and William Taylor, of the borough of Leicester, in that part of the kingdom of Great Britain called England; that for many years past they have been very extensively engaged in manufacturing sewing cotton thread, at Leicester aforesaid, and vending the same in large quantities, not only in England, but throughout the United States, and in particular in the city and state of New York. That their said thread is, and for many years, has been put up for sale in spools, and labelled on the top of the spool 'Taylor's Persian Thread,' and on the bottom of the spool 'J. & W. Taylor, Leicester;' each spool usually containing two hundred yards, or three hundred yards of thread—and the spools containing two hundred yards being black, and labelled '200 yds.' on the bottom of the spool—and those containing three hundred yards being red, and labelled '300 yds.' on the bottom of the spool—and on the centre of the same label, on the bottom of each spool, is stamped the symbol or print of a lion rampant."

"Your orators further show unto your honor, that their said thread has been, and is manufactured of various sizes and numbers, to meet the wants of the trade; and by means of the care, skill, and fidelity, with which your orators have conducted the manufacture thereof for a series of years, their said thread has acquired a great reputation with the trade throughout the United States, and large quantities of the same are constantly required from your orators, to supply the regular demand for the consumption of the country. And your orators have established agencies for the sale thereof, to the wholesale dealers and jobbers in the cities of Boston, New York, Philadelphia, and New Orleans; and in addition thereto, your orators employ Benjamin Warbenton, now residing in said city of New York, as their general agent for the United States, in relation to the sale of their said spool sewing cotton thread.

"And your orators further show unto your honor, that their said thread is known and distinguished by the trade and the public, as 'Taylor's Persian Thread;' and that your orators were the original manufacturers thereof, and the first who introduced the same to the public. That your orators said general agent, about three weeks since, hearing that complaints were made of the quality of 'Taylor's Persian Thread,' proceeded to investigate the cause of such complaints, and thereupon ascertained that a spurious article of spool sewing cotton thread was

offered for sale by sundry jobbers in the said city of New York, as and for your orators 'Persian Thread;' and that such complaints had arisen from the fraudulent imposition of such spurious article upon the public.

" Your orators further show unto your honor, that their said agent further ascertained upon inquiry, and your orators charge the facts to be, that the said spurious thread so sold, and offered for sale in the said city of New York, was furnished to the said jobbers by one Daniels Carpenter, of Foxborough, in the state of Massachusetts; that the said Daniels Carpenter, disregarding the rights of your orators, and fraudulently designing to procure the custom and trade of persons who are in the habit of vending and using your orators said 'Persian Thread,' and to induce them and the public to believe, that his said thread was in fact manufactured by your orators, has engaged extensively in the manufacture of sewing cotton thread, and caused the same to be put up for sale in spools similar to those used by your orators—and so colored, stamped, and labelled as to resemble exactly the said spools used by your orators. And the said spool sewing cotton thread, prepared by the said Daniels Carpenter, and sold by him, and in which he is engaged in selling, as aforesaid, is an exact imitation of the same article which your orators had been manufacturing as aforesaid, and selling in the United States, for many years before the said Daniels Carpenter commenced his said fraudulent imitation thereof. And the said spurious article, although inferior in quality to the genuine Persian thread, manufactured by your orators, can only be distinguished therefrom, (so exact is the said Daniels Carpenter's imitation, as aforesaid,) by a careful examination of its quality, and by its falling short in the number of yards contained on each spool, from the number marked thereon as the contents thereof. And that the general appearance of the spurious article is the same as that of your orators genuine thread, and well calculated to deceive those dealing in the purchase and sale thereof.

" Your orators further show unto your honor, that their said general agent has obtained specimens of the said spurious Persian thread, so sold by the said Daniels Carpenter; that in the specimens thus obtained, the thread is put upon black spools, of the same size and appearance with those used by your orators; on the top of which spurious spools there is pasted a round paper label, partly gilt, on which is printed in a circle, the words 'Taylor's Persian Thread,' and in the centre of the circle the number of the thread, and on the other end or bottom of such spurious spools, there is pasted a round white paper label, on which is

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printed in a circle, the words 'J. & W. Taylor, Leicester,' and across the label the word '200 yds.,' and in the centre of the label there is impressed the figure or symbol of a lion rampant. And in all these particulars of the labels on each end of the said spurious spools of thread, they are exactly like the labels on the respective ends of the spools of your orators genuine Persian thread, as hereinbefore stated.

"Your orators further show unto your honor, that they have not yet ascertained the extent to which the said Daniels Carpenter has carried his said fraudulent imitation of your orators said thread. But your orators said general agent has found the same offered for sale to the trade in three wholesale or jobbing houses in the said city of New York, as Taylor's Persian thread. From which your orators believe, and they therefore charge on their belief, that the said Daniels Carpenter has been, and is engaged in selling his said fraudulent and spurious imitation of your orators Persian thread to a large extent, in various places in the United States—and as your orators are informed and believe, the said Daniels Carpenter is expected daily to arrive in the city of New York, to make further sales of his said imitation of your orators thread.

"Your orators further show unto your honor, that the said fraudulent and inequitable conduct of the said Daniels Carpenter is not only injuring them in the sales of their said genuine Persian thread, and the profits which they would otherwise reasonably make thereon; but by the inferior quality and false measure of the said spurious Persian thread, is greatly prejudicing the reputation of your orators said Persian thread in the market; and, unless the said imitation is discontinued or prevented, will ultimately destroy the character and standing of the genuine article.

"And your orators also charge that the said spurious article is a fraud and deception upon such of the citizens of New York, and of the United States, as purchase the same, believing it to be the genuine article manufactured by your orators."

The bill prayed for a discovery; and for an injunction and account in these words, viz. "And that the said Daniels Carpenter, and his attorneys, solicitors, counsellors, agents, and servants, may be enjoined and restrained from manufacturing, selling, or offering for sale, directly or indirectly, any spool cotton sewing thread, manufactured by him, or any other person than your orators, under the denomination of 'Taylor's Persian Thread,' or on spools with the words 'Taylor's Persian Thread,' or 'J. & W. Taylor, Leicester,' printed, painted, written or stamped, or attached or pasted thereon; or on spools so made, or having any la-

bel, printing, or device thereon, in such manner as to be a colorable imitation of your orators said Persian thread, usually known as 'Taylor's Persian Thread.' And that the said Daniels Carpenter may be decreed to account to your orators for all the profits which he has made by the sale of his said fraudulent imitation of your orators thread, and all the profits which your orators would have made on the sales of their genuine thread, but for the said Daniels Carpenter's inequitable and wanton piracy of their said names, spools, and labels."

The bill also prayed for general relief, and for process of subpoena and injunction.

In his answer the defendant stated as follows :

"That he is not acquainted with the complainants, but he is informed and believes, that they are subjects of Great Britain, and not citizens of the United States ; and he is willing to, and does admit, that they reside in Leicester, in England ; and that he is informed and believes, that the complainants, or some other persons of the same name with the complainants, have been engaged in vending sewing cotton thread, but in what quantities, or where in England, he is unable to answer ; but he is informed and believes, and therefore admits, that such thread has been vended in large quantities throughout the United States, including the city of New York ; but he is informed and believes, that the complainants are not the manufacturers of the thread so vended by them. And he admits, that the thread so sold by the complainants, or persons of the same name, for many years has been put up for sale on spools, and labelled and marked as in the bill of complaint, for such purpose, is set forth. And that such thread has been, and is manufactured of various sizes and numbers to meet the wants of the trade.

"And this he further admits, that the thread so vended by the complainants, and so marked and labelled, has acquired a great reputation in the trade throughout the United States, and that such reputation is founded on the manufacture thereof, and that large quantities are required to supply the regular demand for the consumption of the country. And he is informed and believes, that the complainants have established agencies in the places and for the purposes mentioned in the said bill, and that Benjamin Warburton is their general agent for the United States.

"And he admits, that such thread is distinguished by the trade and public, as 'Taylor's Persian Thread ;' but he does not know, nor is he informed, save in and by the said bill, that the complainants were the

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original manufacturers thereof, or the first who introduced the same to the public.

“That this defendant is a citizen of the United States, and of the State of Massachusetts, residing at Foxborough in that state; and that he has engaged, though not extensively, in the manufacture of sewing cotton thread, which he has caused to be put up for sale on spools, similar to those used by the complainants, and so colored, stamped and labelled, as to resemble exactly, or as nearly as the same could be done, the spools sold by the complainants. And he admits, that the spool sewing cotton thread prepared by him, and sold by him, and which he is engaged in selling, is an exact imitation of the same article which the complainants had been selling in the United States many years before the defendant commenced manufacturing his thread in imitation thereof.

“That the thread so manufactured, and put up and sold by him in imitation of the thread vended by the complainants, is in all respects as good as the thread vended by them, and each spool so put up by the defendant contains as many yards of thread as a spool of like appearance vended by the complainants.

“That he has furnished his thread in the city of New York to the two firms of Russell, Mattison, Taylor & Co. and Shepherd & Howe, to be sold, and has sold some of his thread to other houses in that city, but they well knew this defendant manufactured the same; and as he is informed and believes neither of those firms or houses ever sold, or offered for sale any of said thread, pretending or stating, that it was the same as that vended by the complainants, but on the contrary, they always informed the purchasers thereof, that the same was manufactured by this defendant.

“And this defendant submits to this court, that the said complainants, subjects of Great Britain, and not citizens of the United States, could not, and did not acquire by reason or means of any matters or things set forth in the said bill of complaint, nor have they now any exclusive right or rights of vending spool sewing cotton thread put up, or to be put up and labelled, or marked in the manner set forth in the bill; but that this defendant has full right and lawful authority, to manufacture thread in the United States, and to put up the same on spools, and with labels in all respects similar to the thread, spools and labels vended by the complainants, and to sell and dispose of the same in any part of the United States, so prepared, put up and labelled. And he prays the same advantages from this objection, as if stated by way of plea or demurrer.

“ He admits, that the statements contained in the bill, in relation to spools, labels and marks, on which the thread manufactured by this defendant is put up, are correct and true ; and that he has been, until the service of the injunction issued in this cause, engaged in selling his thread, put up, labelled and marked as aforesaid, to some extent, but not to a large extent, in various places in the United States. And he supposes, and therefore admits, that the introduction of the thread so manufactured by him, in the market, does lessen the amount of sales of thread by the complainants, and to that extent the complainants may be injured ; but he denies that the reputation of the thread vended by the complainants is at all injured by the means stated in the bill. And he also denies, that the thread manufactured by him, is inferior in quality, or false in the measure, as charged in the bill.

“ He admits, that such of the citizens of the United States, and of the state of New York, as purchase the thread manufactured by him, believing it to be the thread vended by the complainants, are mistaken, and to that extent deceived ; but he expressly denies, that those citizens are thereby injured, or in any manner damnified.

“ He says, that before he commenced the manufacture and putting up of the thread as stated, other citizens of the United States had been in the habit, and still continue to manufacture sewing cotton thread, and to put up the same on spools, labelled, colored and marked, in imitation of the thread and spools so vended by the complainants, and to sell the same in various parts of the United States.”

A general replication was filed to the answer ; but no proofs were taken in the cause.

After the replication was in, the defendant moved to dissolve the injunction on his answer. When the Chancellor decided that motion, it being agreed that it involved the merits of the cause, and the defendant desiring a speedy disposition of the suit with a view to an appeal ; a final decree was then made by the assent of the parties, on the 6th of January, 1845. By this decree the injunction was made perpetual, the defendant was charged with the costs of the suit, and the complainants were permitted, at their election, to take a reference to a master to ascertain the damages which they had sustained by reason of the defendant's simulating their name and trade marks. If they so elected, the cause might be set down for further directions upon the master's report ; otherwise the decree was to be considered as final.

The following opinion was delivered by his Honor the Chancellor, on deciding the cause, which was argued by,

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Murray Hoffman, for the complainants, and

Joseph Blunt, for the defendant.

THE CHANCELLOR.—The fact that the complainants are subjects of another government, and the defendant is a citizen of the United States, as stated in the answer, cannot alter the rights of the parties, or deprive the complainants of the favorable interposition of this court, if those rights have been violated by the defendant. So far as the subject matter of the suit is concerned, there is no difference between citizens and aliens. And the only question proper to be considered is, whether the defendant has the right, as he insists he has, to pirate the trade marks of the complainants, with impunity, and to palm off upon the community a simulated article as the genuine Taylor's Persian thread, manufactured and put for sale by them.

In the case of *Bell v. Lock*, (8 Paige's R. 75,) I had occasion to examine the question, whether an injunction bill could be sustained for the fraudulent assumption of the name of the complainant's newspaper, for the purpose of deceiving the public and supplanting him in the good will of his business; and I then came to the conclusion, that this court had jurisdiction to interfere for the protection of the complainant's rights in such a case. I then referred to the case of *Knott v. Morgan*, (2 Keen's Rep. 213,) where the present Master of the Rolls, in England, granted an injunction to restrain the defendant from running an omnibus, having upon it the simulated names and devices which were previously in use by the complainant, for the purpose of inducing the public to believe that it was the complainants' omnibus, and thus to deprive the latter of a part of the good will of his business by this fraudulent device.

Since the case of *Bell v. Lock* was before me, the case of *Millington v. Fox*, (3 Myl. & Craig's Rep. 338,) was decided by Lord Cottenham, which fully sustains the claim made by the complainants in the present case. There the complainants had for many years been engaged in the manufacturing of steel of a particular name or mark thereon, indicating the person by whom it was manufactured. The defendants, without being aware that this was the trade mark of the complainants, or of any individual, commenced the manufacture and sale of steel with the complainants marks thereon. And a perpetual injunction was granted against the use of such marks, although the Lord Chancellor was satisfied no fraud was intended.

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He says, that having come to the conclusion that the complainants were entitled to the marks in question, they had an undoubted right to the assistance of a court of equity to enforce that title by a perpetual injunction. But as the defendants had given notice of their intention to abandon the use of the marks, as soon as they discovered that they belonged to the complainants, they were not charged with costs. A case is also cited by Lord Henley in his treatise upon injunctions, where a manufacturer of blacking was restrained from using labels in imitation of those used by the complainant in that case. (See also, *Ransom v. Bentall*, 3 Law Journal, 161.)

In the case under consideration, the defendant admits that he has intentionally pirated the complainants names, as well as their other marks, and that he put up the spools of thread manufactured by him, and stamped and marked with the marks, and so colored, stamped and labelled as to resemble exactly, or as nearly as could be done, the spools used by them.

After such an avowal, no one can doubt for a moment, that he did it for the fraudulent purpose of inducing the public, or those who were dealing in the article, to believe that it was in fact the thread manufactured and put up by the complainants, and with the intention of supplanting them in the good will of their trade and business. And it is wholly immaterial, whether the simulated article manufactured by the defendant is, or is not of equal goodness and value to the real "Taylor's Persian Thread," manufactured and put up for sale by the complainants; they are, therefore, entitled to the relief prayed in this bill.

The injunction must be made perpetual, and the defendant must pay to the complainants their costs of this suit; and if the complainants wish it, they may have a reference to a master, to ascertain and report the amount of their damages, and a decree, that the defendant pay the amount of such damages upon the coming in and confirmation of the master's report.

The defendant appealed from the decree of the Chancellor, to the Court for the Correction of Errors, where the cause was argued in October, 1846, by the same counsel, who were heard before the Chancellor; and the decree was affirmed on the 30th of December, 1846, by a vote of twenty-two against two.

The following opinions were delivered in that court, (for which the

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author is indebted to Judge Lott, as well as to Judge Denio, the State Reporter, in advance of the regular publication of his reports.)

BEARDSLEY, Justice.—The complainants below, the Taylor's, reside in England, and are extensive manufacturers of thread which they sell in the United States, particularly at New York. Their thread has for a long time been put up in spools, labelled on the top of the spools, "Taylor's Persian Thread," and on the bottom of the spools, "J. & W. Taylor, Leicester."

The defendant, (Carpenter,) has been engaged in the manufacture of thread in Massachusetts in imitation of the complainants, and which he has labelled like theirs. His thread labelled in this spurious manner, he has sold and offered to sell, in the city of New York.

An injunction was granted on the bill. The case was heard on bill, answer and replication, and a decree entered making the injunction perpetual with costs, &c., and directing a reference to a master to ascertain the damages the complainants had sustained by the fraudulent use of their trade marks.

1. The injunction was proper. The complainants have a right to call upon the court to restrain the defendant from fraudulently using the words and devices which they had previously taken for the purpose of distinguishing their property. (*Knott v. Morgan*, 2 Keen, 213; *Millington v. Fox*, 3 Mylne & C. 338; *Bell v. Lock*, 8 Paige, 275.) A man cannot be permitted to sell his own goods under the pretence that they were the work of another, when the fact is not so. (*Taylor v. Carpenter*, decided by Judge Story. See report.)

2. An order for an account is also proper that the remedy may be complete in the case. (3 Mylne & C. *supra*; *Bailey v. Taylor*, 1 Russ. & M. 73; *Whittington v. Wooler*, 2 Swanst. 428.) *Delondre v. Shaw*, (2 Simons, 237,) was decided on the ground that the plaintiffs had not any interest in the labels and seals. The V. C. said, the court cannot protect the *copy right* of a foreigner; and therefore the fact that the seals were *invented* by Pelletier, (a foreigner,) did not aid the case.

3. A final decree was proper. The case had been heard on the pleadings. So at least, I understand the decree as printed at page 9. We cannot say whether it were in a condition for final hearing if either party objected. Probably the pleadings disclosed the whole case, and it was by consent heard in full on the merits when the motion to dissolve the injunction was made.

The decree should be affirmed with costs.

LORT, Senator. The principal question involved in this case is so fully discussed by the Chancellor and by Mr. Justice Story, (whose opinion in a cause between the same parties in the United States Circuit Court, Massachusetts district, decided in October term, 1844, has also been laid before this court,) that it would, in my opinion, be an act of supererogation to attempt to add to the views presented by them. It is sufficient to say, that I concur in those views, and in the result at which they arrived. (See also *Coats v. Holbrook*, reported in 3 N. Y. Legal Observer, 404, where the subject is elaborately and ably examined.) It may be proper, however, to advert to one of the grounds insisted on and urged by the opening counsel of the appellants, in favor of the reversal of the decree appealed from. He appears to assume that the aid of the Court of Chancery was invoked by the complainants below to secure them against a fair, honest and legitimate competition in their business. Such is not the scope or design of their bill. Its object is to prevent the commission of a fraud, not only on them, and to the prejudice of their rights, but on the public, by the sale of an article with an imitation of their "trade mark" thereon in such a manner as to deceive purchasers, and through the false representations thus held out, to deprive the owners thereof of the profits of their skill and enterprise.

Honest competition relies only on the intrinsic merits of the article brought into market, and does not require a resort to a false or fraudulent device or token. That certainly cannot deserve the appellation, which studiously gives to the product of pretended superior skill, the name and exact external resemblance and imitation of the article with which it professes to compete.

A disguise is not usually assumed for an honest object. It is a mark more characteristic of deception and fraud. It defeats the very end and object contemplated by legitimate competition, the choice to the public to select between the articles exposed to sale; and operates as a deception and imposition on the dealer. It is to prevent such a course of transaction and dealing, that the interposition of the Court of Chancery is asked, and I have no doubt it is within its proper jurisdiction to restrain a proceeding of such a character by injunction. It was urged that although it might be a proper case for such relief, if it were a controversy between citizens of the United States, yet that "the complainants are foreigners, and are not entitled to ask the interference of the courts of this country except upon the ground of reciprocal courtesy and comity on the part of their own country, and upon this ground they cannot contend, as the legislation of England is eminently hostile to the

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commercial interests of other nations." From this position I entirely dissent. It was well said by the counsel for the respondents, "that it is an inauspicious time for the success of such an argument, when the land is sounding with congratulations at the relaxation of England's commercial code; when it has been asserted by one of her eminent statesmen, 'that the foundations of an amity are now laid, which the convulsions of nations shall not shake nor time corrode.'"

But be that as it may, I trust our courts will never recognize a different rule of right and justice between any class of suitors; that their records will never show that a fraud by a citizen is sanctioned, because it is practised on a foreigner in the prosecution of a legitimate business, within our jurisdiction, or that a suitor is denied the ordinary remedy to protect him in the enjoyment of his rights, because he is a "*foreigner*." The honor of our country and the character of its jurisprudence, forbid that justice and equity shall ever be administered on such narrow, proscriptive and inequitable principles. Every dictate of enlightened wisdom requires that a foreigner, especially in a commercial country, shall be entitled to the same protection of his rights as a citizen. If other nations are chargeable with wrong and injustice in this respect, it is certainly no reason why we should follow their example. Retaliation in a course of injustice, is not a salutary principle to enforce in the administration of justice. But I do not think that England is amenable to the charge, to the extent suggested by the counsel of the appellant. All that was decided in *Delondre & Pelletier v. Shaw*, (2 Simons Rep. 237,) cited by him in support of it is, that "the court will not protect the copyright of a foreigner." The Vice-Chancellor however expressly recognizes the rule that an injunction will be granted to restrain the fraudulent sale of a spurious article, but he says that he could not intend a fraud where none was alleged.

It is immaterial, in my opinion, that the complainants were not admitted by the answer to be the manufacturers of the article. It was conceded that they were the venders, and that they were extensively engaged in the sale thereof in the city of New York and throughout the United States; that they had established agencies in that city, and in several other cities in the union; and that large quantities were required to supply the regular demand for the consumption of the country. There is nothing shown to impeach or question their right to sell. They, therefore, are the parties to be affected by any fraudulent interference with their sales. Their thread was distinguished by the trade and public as "Taylor's Persian Thread," and

had acquired a great reputation throughout the United States. It was upon spools with certain marks, which afforded the public the means of identifying it. The thread manufactured by the defendant, was prepared in exact imitation of the article sold by the complainants, and was put on spools similar to those used by them, and so colored, stamped and labelled as to resemble them exactly, or as nearly as could be done. It is evident, therefore, that this device was calculated, and no doubt intended, to secure to the defendant in the sale of his thread, the benefit of the reputation which the complainants had acquired. It is immaterial whether the thread was of the same or inferior quality. The natural effect of the transaction, was to palm on the public a different article from that which they intended to buy, and to interfere with the right of the complainants to profits which the reputation of their article justly entitled them to. The defendant, it is true, alleges in his answer that the deception was made known to the firms or houses, to whom he made sales of his thread, and that they never stated or pretended in selling or offering it for sale, that it was the same as that vended by the complainants, but on the contrary, that "they always informed the purchasers thereof that the same was manufactured by the defendant." Although this is an allegation, from its very nature, not entitled to much credit, yet, assuming it to be true, it does not alter the case.

The thread was an article of general merchandize, and the deception may not have been communicated to dealers or purchasers in small quantities. Indeed it appears incredible, that a studied effort should be made, to counterfeit an article, yet that the fraud, should be as extensively circulated as the reputation of the article itself. The object of such a course is not easily seen, and it is requiring more credulity than is ordinarily possessed, to give the allegation credit.

The only point remaining to be considered is the objection made to the form of the decree. It purports to have been made on "a hearing on the pleadings therein, upon a motion to dissolve the injunction issued in the cause," and is final.

It is insisted that such a decree could not be made on a mere motion to dissolve an injunction. If that be conceded, yet it does not clearly and satisfactorily appear, that it was so made. The Chancellor, in his opinion, in support of it, says, the case was heard upon bill and answer, as upon a final hearing, and the decree, although it states, that it was made upon a motion to dissolve the injunction, also declares, that the cause had "been brought to a hearing on the pleadings therein;" terms peculiarly appropriate to a final hearing and not usual nor applicable

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upon such a motion. These apparently conflicting recitals or declarations, are reconcileable on the assumption that although it was originally brought on as a mere motion, yet that it was finally by agreement considered as a final hearing on bill and answer. The notice in pursuance of which it was heard is not in the case, nor is it shown by the certificate of the register what is the true state of the facts.

In this uncertainty, we are bound to assume that the decree which is final, was properly made. It is the duty of the party seeking a reversal, clearly to satisfy the court of the error, if any, in that respect. This he has failed to do.

Indeed it is questionable whether the objection can be taken as the ground of an appeal; it partakes more of the nature of an irregularity. At all events, it was reasonable that the attention of the court below, should have been called to it, by the party now seeking advantage of it, while it might have been corrected without the costs and expense of an appeal.

Upon the whole I agree with the counsel for the respondents, that "the interests of trade, the comity of nations, the protection of our citizens, require that so palpable and unblushing a fraud upon the right of others, (as is disclosed in this case,) ought not to be permitted to pass unredressed."

The decree of the Chancellor, ought therefore to be affirmed.

SPENCER, Senator.—The decree of the Chancellor is sought to be reversed upon two grounds:

First, That it was prematurely pronounced; and *Second*, That it is contrary to law; in other words that it is erroneous on the merits.

It is true that when the motion was made to dissolve the preliminary injunction which had been issued, a replication to the answer had been filed. The Chancellor instead of simply denying the motion, made the injunction perpetual, and decreed the payment of costs by the defendant, and directed a reference to a master to report damages, &c., if the complainant should elect within thirty days to take it.

It may not be as usual to pronounce a final decree after the filing of a replication, without taking or closing proofs, as it is when a cause is brought to a hearing on bill and answer. But before a decree will be reversed for this reason, it must be made to appear that some substantial rights have been lost, or a valid defence cut off, or that the decree is founded on erroneous principles.

The replication does not affect any of the matters admitted by the answer. It only puts in issue any denial of facts charged in the bill,

and any new matters of fact set up in avoidance by the answer. The complainant is then at liberty to prove the facts charged and denied, and to disprove the new matter set up in the answer which the defendant has attempted to establish by proof; and such proofs on both sides must be confined to the allegations contained in the pleadings.

On looking with some care into the bill and answer, it seems to me that every material fact stated and charged in the bill, is admitted by the answer; and that none of the denials or new matter stated in the answer, if fully proved on the part of the defendant, would in any degree alter the merits of this case. The cause may be now therefore, decided on its merits.

The principle involved in the merits, is one of great importance to a manufacturing and commercial community; but it is not novel in its character, or in its application to the present case. It involves the question whether or not our law and courts will protect persons in the enjoyment of the legitimate and well deserved fruits of their own ingenuity, industry, integrity and fidelity to the public. And it does not at all trench upon the rights of others, by a course of conduct equally deserving and praiseworthy, to enter the lists of competition, and bear off the palm. But it will not allow them by falsehood, fraud, and forgery, to filch from another his good name, and share it in common with him, or destroy or impair it.

The right claimed by the complainant, does not partake in any considerable, if in any degree, of the nature and character of a patent or copyright, as urged by the counsel for the defendant. He is at full liberty to manufacture and vend the same kind of thread to any extent he pleases, and whenever he chooses. He is only required to depend for his success, upon his own character and fame. He may make his spools red, black or white, or he may adorn them with his country's stripes, and stamp upon them its spread eagle, instead of the "rampant lion" of the complainants country. He is only required not to pirate upon the rights of others.

It is of no small importance to a manufacturer and vender of flour or salt, or to a packer of provisions, that his brand should inspire confidence in the public mind, and thereby secure a ready sale; and so of every other manufacturer. And the assurance that he can securely enjoy its exclusive benefit, is always found to be among the highest incentives to ingenuity, laborious exertion, and honorable and faithful conduct, and is one of the greatest securities to the public against imposition. I would not in the smallest degree relax or restrict this salutary

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rule of law. It has, in my opinion, been rightly applied in the present case. The cases cited in the opinion of the Chancellor, and the opinion of Mr. Justice Story, in a similar case, between these parties, fully sustain its application here.

The circumstance urged upon the consideration of this court, that the complainants are British subjects, and the defendant is a citizen of Massachusetts, is not worthy of serious refutation. The countries being at peace, the citizens of the one and the subjects of the other, are alike entitled to the same measure of justice in our courts.

Nor is it worthy of the dignity of this court, or of our country, to inquire into the truth of the suggestion made by the counsel for the appellant, that the courts of Great Britain do not afford the same protection to our citizens in like cases, that the respondents ask and seek at our hands. It is enough for us to know that we administer equal and exact justice to all who invoke it. In my opinion the decree of the Chancellor should be affirmed.

BARLOW, Senator.—I fully agree with the learned Chancellor in his opinion on the merits of this case. It is with an ill grace, that the defendant below, asks our courts of justice to protect him in the fraud he is practising upon the rights of even a foreigner.

It was not necessary for the complainants to be under a copy-right, if they could obtain one in their country, or to be citizens, in order to claim protection against counterfeits and forgeries of their labels and marks.

The defendant might exercise the right of manufacturing the same kind of spool and thread, and put it in market, and the complainants could not find fault with the competition. But he cannot complain if he is compelled to act under his own name and responsibility, or at least is restrained from deceiving the purchaser and filching the good name of another manufacturer. And there is no apology or justification, legal or moral, for his counterfeiting the labels and marks of the complainants in order to succeed in market by false colors, under the repute the complainants thread had meritoriously gained, and thereby rear up an unmerited success or competition. Such a course was fraudulent in intention and effect, and should be discountenanced by all honest business communities.

But it is said the decree rendering the injunction perpetual was premature, and should be reversed. If the decree was prematurely entered, it would present a question of regularity which should have been

treated as such below, and at the proper time. But the defendant has treated it as on the merits, without resorting to the proper practice to avail himself of the question as one of irregularity. I shall consider the case therefore, as on a submission on bill and answer. The defendant it is true, denied some material allegations of the bill; but they had a bearing upon the question of damages, rather than the relief on the merits. He admitted sufficient to sustain the bill without further proof, and to entitle the complainants to their perpetual injunction. He could not subsequently deny and disprove those admissions of his answer; and the proof admissible could bear only upon the question of the amount of damages. Although the complainants put in a general replication, it was not a denial of the admissions of the defendant of the statements of their bill. If it were, it would also be a denial of the bill itself, so far as the statements which were admitted were concerned. It is neither the office nor intent of a replication to go so far. Whilst the decree properly rendered the injunction perpetual, it left the question as to damages open to proof; and if the complainants did not see fit to take any testimony on that subject, the defendant cannot complain.

The decree therefore was right, and should be affirmed.

WRIGHT, Senator.—In the statement of the case by the Chancellor, which precedes his opinion, it is said that the case was heard before him on bill and answer; and he has proceeded to make a final decree in the cause upon that assumption, when in fact, a replication had been filed, and the cause never was in readiness for a final decree. The motion to the Chancellor, was simply for an order dissolving the injunction; and he could only, in the then state of the cause, grant or deny that motion, leaving all the questions arising upon the case, so far as the replication put in issue any facts set up, or not admitted in the answer, to be determined upon the final hearing of the cause. I say the Chancellor has made a final decree. It is settled that granting a perpetual injunction, is a final decree; and it must necessarily be so, as it overcomes all defence, and assumes that the case made by the complainant is fully sustained either by proof or by admissions in the answer. (1 Barbour Ch. Pr. 615.)

In the present case a replication has been filed; and the effect of that is to put in issue by the complainant every allegation in the answer. And yet a final decree can only be made, or the cause be brought to a hearing, on bill and answer, when every fact and allegation in the answer is *admitted* to be absolutely true; and it makes no difference as to

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the rule of practice, whether the answer be responsive to the bill or not. (1 Hoffman's Ch. Pr. 495; *Brinckerhoff v. Brown*, 7 Johns. Ch. Rep. 217.)

The complainant by filing a replication, confesses that upon the bill and answer he would not be entitled to the relief sought by his bill. He in effect asserts that the *defence* set up is not *true in point of fact*, and calls upon the defendant to sustain his allegation by proof; and does not merely insist that the facts thus alleged, *if true*, are insufficient to bar the relief sought; and his replication also confesses that he has made allegations in his bill which are not admitted by the answer, and which he is bound to *prove* before he can claim the relief asked by his bill. (*Mills v. Pittman*, 1 Paige, 490.) It necessarily follows, from this view of the practice and well settled course of proceedings in the Court of Chancery, that the final decree made upon the motion to dissolve the injunction is irregular and should be reversed. It is equally clear to my mind that if the case is to be decided upon the assumption that no issue was made upon the answer by a replication, the complainants must fail. In this aspect of the case the absolute verity of the answer is to be taken; and if it does not admit the full truth of the case as made by the bill, or sets up facts to meet the equity relied upon, the bill must be dismissed.

It is alleged as a substantive and material fact in the bill, that the complainants are *manufacturers* as well as *venders* of the thread, the trade marks of which they allege the defendant has simulated. This is, as I think, denied in the answer. Most certainly they have no right to call upon the defendant in this case to account for using a mark upon thread which they simply *vend* in the market, and in regard to which so far as the right to use a trade mark is concerned, they are imposing upon the public a trade mark not their own. The maker and vender is entitled to protection against a piracy of *his trade mark*, not the person who buys to sell. The public are led to believe when they see a trade mark upon any article of merchandize, that the person whose name is there used, is the only maker and vender of that article, and that it has certain qualities which distinguish it in value above all others of a like kind. But if any one who *sells* has the right to use the trade mark—as he certainly has unless the *manufacturer* interferes and objects—then I do not see the principle upon which the complainants here have any other or greater rights growing out of the use of this trade mark, than any other vender of the article; and it will hardly be assumed that every *seller* of "Persian Thread" in Great Britain has the right to come here.

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and claim the powerful interposition of the Court of Chancery to protect him in using a mark to which he has no higher or juster claim than the mere use of it upon his spools of cotton thread. The complainants, therefore, were bound to establish the allegations in the bill, that they were the *manufacturers* of the "Persian Thread," before they could ask relief.

Another ground assumed in the bill, is that the appellant has so exactly imitated the trade marks of the respondents, as to deceive and impose upon purchasers, who supposed they were buying the genuine "Persian Thread." The appellant does not admit that any such deception has been committed upon a single purchaser. He admits, to be sure, that his mark and the mark of the respondents are identical, but says that every individual in New York who purchased his thread, knew it to be his own manufacture; and that he is informed and believes, that neither of the houses to whom he sold his "Persian Thread," ever sold, or offered to sell it, as the thread manufactured by the complainants; but that they, in every instance, sold it as the thread manufactured by the appellant. This allegation in the answer is also to be taken as true, if a final decree is to be made in this stage of the cause; and it clearly shows that the appellant had never attempted to sell his thread in New York as the thread of the respondents.

The bill further alleges, that the thread manufactured and sold by the appellant is *inferior in quality* to the genuine "Persian Thread," and therefore the sale of the real article of the respondents is injured in the market. The answer expressly denies this: and how the Chancellor can sustain the allegation that this is an immaterial fact, I am at a loss to discover. The complainants expressly claim an account against the appellant for all the profits which he has made by the sale of his fraudulent imitation of their thread, thereby making it a very material question in settling the amount of damages which the respondents have sustained whether their thread is any better than the thread of the appellant.

Upon the whole case, I am satisfied that the decree is wrong, and should be reversed. If the respondents can, by proper evidence, bring their case within the rule which forbids the piracy of a trade mark, they will be entitled to the aid of the Court of Chancery; but upon this case as made by the bill and answer merely, I think they must fail.

Decree affirmed, with costs.

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PARTRIDGE v. MENCK and others.

In a suit to restrain the use of trade marks alleged to be simulated, if it appear that the marks used by the defendants, though resembling the complainant's in some respects, would not probably deceive the ordinary mass of purchasers, paying the attention which such persons usually do in buying the article in question; an injunction will not be granted.

An imitation is colorable and will be enjoined, which requires a careful inspection, to distinguish its marks and appearance, from those of the manufacture imitated. In these cases, the question is not whether the complainant was the original inventor or proprietor of the article made by him and upon which he now puts his trade mark; nor whether the article made and sold under his trade mark by the defendant, is equal to his own in quality or value. But the court proceeds on the ground, that the complainant has a valuable interest in the good will of his trade or business; and having appropriated to himself a particular label, sign or trade mark, indicating to his customers, that the article is made or sold by him or by his authority, or that he carries on business at a particular place; he is entitled to protection against one who attempts to pirate upon the good will of his friends or customers or the patrons of his trade or business, by using such label, sign or trade marks, without his consent or authority.

Where the case is one of doubt in respect of the alleged piracy, the court should not grant or retain an injunction until the cause is heard on pleadings and proofs, or until the complainant has established his right by an action at law.

Before Vice-Chancellor Sandford, Nov. 10, 11; Dec. 4, 1846.

Before Chancellor Walworth, on appeal, Jany. 6; Jany. 25, 1847.

THIS case came before the Vice-Chancellor of the first circuit, on a motion founded upon the bill and answer, to dissolve the preliminary injunction granted by an injunction master on filing the bill.

It appeared by the bill, that one A. Golsh, who formerly resided in the city of New York, commenced the manufacture of a certain kind of friction matches, usually known as loco-foco matches, for which he acquired a great patronage. His matches were put up in small paper boxes, usually of brown paper, made with a cap or cover, which when placed on the box covered about a third of its length; and his trade marks were a cut representing a straw bee-hive surrounded by flowers and foliage, with the words "A. GOLSH'S FRICTION MATCHES," above the hive. Both the cut and the words were printed on a label which was pasted upon the front of each box. Under the bee-hive was inserted on the label, usually in two panels, the street and number of the manufactory, and between what streets it was situated, and the place, "New York," under all.

The complainant succeeded Golsh in the business, and became enti-

tled to use his trade marks, and had continued to manufacture and sell the same article of matches, using those trade marks, and sometimes a label somewhat varied from the one described. His business had extended, so that large quantities of his matches were exported to the West Indies, Mexico and South America. The bill charged that the defendants Menck & Backes had been and were engaged in making friction matches for sale in New York, purporting to be the Golsh matches. It set forth two labels as being used by the defendants upon the brown paper boxes in which they put up their matches. One contained the device of the bee-hive and foliage, over which were printed the words "Menck & Backes' Friction Matches, late chemist to A. Golsh;" the words *late chemist*, being in caps smaller than the rest; and under the bee-hive, were printed in two panels the number and street in which their manufactories were situated, and under all the place, "New York." The other label contained a better executed bee-hive, with flowers and foliage, the same printed words under it, similarly arranged; and over it the words "MENCK & BACKES, FRICTION MATCHES MADE BY J. BACKES LATE CHEMIST FOR A. GOLSH." The words "A. Golsh" being much larger and prominent than those above them.

The bill alleged that this was a piratical and fraudulent invasion of the complainant's trade marks, and had greatly injured him in the sale of the genuine A. Golsh matches. That the defendants by the use of their labels, intended to deceive purchasers of matches, and lead them to buy theirs, supposing them to be the genuine article which was known as the Golsh matches. That the other defendant, Samanos, advertised to receive orders for the spurious matches at his store, and was selling them in large quantities, in behalf of himself and his co-defendants. The bill prayed for an injunction against the further manufacture and sale and advertising for sale by the defendants, of matches so put up and labelled, or of any matches with the word "A. Golsh" and a bee-hive labelled on the boxes.

The defendants in their answer, admitted that Golsh established the manufacture and sale as alleged, and that the complainant succeeded to his business and used his trade marks. They stated that both Golsh and the complainant had at times used other and different marks. They admitted that they used and intended to use the label lastly above described, on their boxes of matches; but denied that they had for a long time before filing the bill, used the label first charged upon them in the bill, or ever used it to any great extent. They stated that the de-

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fendant Backes, was employed by Golsh himself, in the manufacture of his matches, and that Golsh communicated to him the mode and mystery of the manufacture as conducted by him ; and they apprized the public of the fact by the words on their label. They denied the piracy and fraud charged in the bill, and averred that they always sold the matches as their own manufacture, and not as Golsh's, or the complainant's, and never intended to have purchasers so believe. That their matches were made in the same mode as Golsh's, and were better than those made by the complainant.

The motion before the Vice-Chancellor, was argued by,

E. H. Owen and *F. B. Cutting*, for the defendants ; and

A. H. Dana and *C. Edwards*, for the complainant.

THE VICE-CHANCELLOR.—My views of the law relative to trade marks, were fully stated in the case of *Coats v. Holbrook*, which was referred to on the argument, and they remain unchanged.

In this case the question arises upon a motion to dissolve the injunction, so that I am to be governed as to the facts, by the statements contained in the answer.

Thus it appears that the defendant Backes, was formerly a chemist in the employ of A. Golsh ; and therefore the label describing him as "late chemist for A. Golsh," is true. It further appears that the boxes used by the defendants, when the top or cover is put on, exhibit the whole of the words which I have quoted ; and when the top is removed the label shows the additional words above those quoted, "Menck & Backes Friction Matches made by J. Backes," in legible capital letters. Then in the lower compartments of the label, the places where the defendants make and sell them are legibly printed and are different from those on the complainant's label. The mark of the bee-hive is a strong point of resemblance between the two labels, and although the defendants is upon a ground so black and so entirely filled with flowers and herbage, as to be manifestly distinguishable on a comparison with the complainant's label, yet if the case stood on that point only, I should think the imitation was so close as to be calculated to deceive ordinary purchasers.

But taking the whole label together, as it appears on a single box of matches when offered for sale, the resemblance of the bee-hive is qualified by the distinct terms "late chemist for A. Golsh ;" so that the arti-

cle does not purport to emanate either from A. Golsh or from his successor.

Now although the court will hold any imitation colorable, which requires a careful inspection to distinguish its marks and appearance from those of the manufacture imitated ; it is certainly not bound to interfere, where ordinary attention will enable a purchaser to discriminate. It does not suffice to show that persons incapable of reading the labels, might be deceived by the resemblance. It must appear that the ordinary mass of purchasers, paying that attention which such persons usually do in buying the article in question, would probably be deceived.

Tested by these rules, I do not think that the defendants label is an unlawful invasion of the complainant's trade mark. The complainant's matches are sold as "A. Golsh's." The defendants are sold as the manufacture of a "late chemist for A. Golsh." And any purchaser looking for the "A. Golsh" matches, would see at a glance, that the defendants article was not his, but that it came from some person, lately his chemist. Though the words "Late Chemist for," are smaller than the words "A. Golsh," on the defendants label ; they are perfectly plain and distinct, and printed in a type only a trifle smaller than the capitals used in our recent published reports.

The use of the bee-hive, I must say, leaves a shade of doubt in my mind, but it is not sufficient to warrant me in retaining the injunction on the case as disclosed by the answer.

The injunction must be dissolved.

The complainant appealed from this order to the Chancellor, and the cause was argued before him on the appeal, by

S. M. Woodruff and *M. T. Reynolds*, for the appellant ; and

Edward Sanford, for the respondent.

THE CHANCELLOR.—Since the decision of this court in the case of *Taylor v. Carpenter*, (In Chan. Dec. 3, 1844,) and which was recently affirmed by the Court for the Correction of Errors, there is no doubt of the power of the Court of Chancery to interfere by injunction to prevent the pirating of trade marks. The question in such cases is not whether the complainant was the original inventor or proprietor of the article made by him, and upon which he now puts his trade mark, or whether the article made and sold by the defendant under the complainants trade

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mark, is an article of the same quality or value. But the court proceeds upon the ground that the complainant has a valuable interest in the good will of his trade or business. And that having appropriated to himself a particular label, or sign, or trade mark, indicating to those who wish to give him their patronage, that the article is manufactured or sold by him, or by his authority, or that he carries on business at a particular place, he is entitled to protection against a defendant who attempts to pirate upon the good will of the complainant's friends or customers or the patrons of his trade or business, by sailing under his flag without his authority or consent.

In many cases it may be difficult to determine whether the complainant's trade mark has been actually pirated in such a manner as to be likely to deceive and impose upon his customers, or the patrons of his manufactures or business, and in cases of doubt, the court should not grant or retain an injunction until the cause is heard upon pleadings and proofs, or until the complainant has established his right by an action at law. But if the court sees that the complainant's trade marks are simulated in such a manner as probably to deceive his customers or the patrons of his trade or business, the piracy should be checked at once by injunction.

In this case I am not satisfied that the label used by the defendants will probably have the effect to deceive and impose upon those who are in the habit of buying and using the matches made and sold by the complainant, by inducing them to believe they are of his manufacture.

I do not find it distinctly charged in the complainant's bill, that he had been in the use of his second label before Menck & Backes assumed the use of their label. But even if there was such a charge, there is about as much difference between that label and the one now used by the defendants, as there is between theirs and the complainant's first label which was originally used by Golsh, except as to the form and appearance of the bee-hive. One difference between the original or Golsh label and the label of the defendants is, that all the printed words and figures on the Golsh label are in black letters upon a white ground, while those on the defendants label are in white letters upon a black ground. The Golsh label is also shorter than the defendants; only reaching upwards upon the box to the bottom of the cover and leaving the whole printed part of the label above the bee-hive containing the words "A. GOLSH'S Friction MATCHES" distinctly visible below the cover of the box, while the printing on the defendants labels runs up under the cover of the boxes, leaving nothing visible above the bee-

hive, except the printed words "LATE CHEMIST FOR A. GOLSH;" and the names of the streets and avenues and the numbers of the building at which the matches are made, at the bottom of these two labels are entirely different. So that without removing the covers from the boxes, the words upon the two labels strike the eye at once as being very dissimilar. And if the covers are removed for the purpose of seeing the parts of the labels which are under them, or to look at the matches, nothing will be found on the Golsh label concealed by the cover of the box; but upon the upper part of the defendants label will be found the words "Menck & Backes Friction Matches, made by J. Backes," printed in small caps. The bee-hive upon the Golsh label is so badly made that it is necessary to look at the cut some time to discover what it was intended for; but that upon the defendants label is an elegantly constructed device, which no one who had seen an old fashioned straw bee-hive in the days of his boyhood, could for a moment suppose was intended to represent anything else. Indeed the difference in appearance between these two labels is so great even while the covers remain upon the boxes, that it is hardly possible to suppose a person who had been in the habit of buying and using boxes of matches with the Golsh label, would suppose those with the defendants label were the same article, from the resemblance between the two labels.

It is not necessary that I should notice all the differences in appearance between the defendants label and the second label of the complainant. It is sufficient to say that the word GOLSH does not appear upon the complainant's second label below the cover of the box; and that the only words upon that label below such cover and above the bee-hive, are "MATCHES without sulphur." But neither of those words appear upon the defendants label below the cover, and the two last words are not to be found on any part of their label. The only real resemblance between the complainant's second label and the defendant's label, either with or without removing the covers from the boxes, are the bee-hives and the black ground upon which the words and figures of the labels appear.

The Vice-Chancellor was therefore right in refusing to retain the injunction. And the order appealed from must be affirmed with costs.

While this note was going through the press, the author received the report of a case decided by Lord Cottenham, (who is again Chancellor

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of England,) on the 11th of December, 1846, in which the application was to restrain an alleged fraudulent imitation of an almanack published by the complainant. The brevity of the report induces the author to publish it entire.

COURT OF CHANCERY, DEC. 11, 1846.

SPOTTISWOODE V. CLARK.

On a bill filed to restrain the defendant from selling a work alleged to be a fraudulent imitation of the complainant's publication; *held*, it not being entirely clear that the complainant had a legal right; and the defendant undertaking to keep an account; that the injunction ought not to be retained. (10 London Jurist Rep. 1043.)

THE plaintiff in this case was the owner of a publication called "The Pictorial Almanack," for 1847, the price of which was 6*d.*; the defendant of one called "Old Moore's Family Pictorial Almanack," for the same year, the price of which was 3*d.* The plaintiff alleged that the defendant's work was a piracy on his publication, and filed a bill accordingly for an injunction. With regard to the substance and internal portion of the two works, there was little or no resemblance; but the covers were, to a certain extent, similar, both being decorated with a pictorial representation of the Observatory at Greenwich, and in the title, as printed on the cover, making use of nearly the same expressions. The plaintiff alleged that this imitation was intentional, and done with a view to deceive the public, and to injure him, the plaintiff. This was denied by the defendant. The Vice-Chancellor of England granted an injunction *ex parte*, to restrain the defendant "from selling any almanacks bound in paper wrappers or covers, or other wrappers or covers with the title 'Pictorial Almanack' printed thereon, or having any other title printed thereon, so as, by colorable representation or otherwise, to represent the almanacks printed and sold by the defendant to be the same as those printed and sold by the plaintiff for the year 1847." An application to dissolve this injunction having been refused by the Vice-Chancellor, the case now came, by way of appeal, before the Lord Chancellor.

Stuart and Moore, for the defendant, the appealing party.

Anderdon and Hallett, for the plaintiff, in support of the decision of the Vice-Chancellor.

In the course of the argument, the following cases were cited :—*Milington v. Fox*, (3 Mylne & C. 338 ;) *Bramwell v. Halcomb*, (id. 737 ;) *Knott v. Morgan*, (2 Keen, 213 ;) *Gout v. Aleploglu*, cited in a note to *Perry v. Truefitt*, (6 Beav. 69 ;) *Croft v. Day*, (7 Beav. 84.)

THE LORD CHANCELLOR, (without calling for a reply.)—These cases depend so much on their own circumstances, that all that the court can do is to lay down principles under which such cases may fall. I have before this had occasion to express an opinion, that, unless the case be very clear, it is the duty of the court to see that the legal right is ascertained, before it exercises its equitable jurisdiction. For this there are good reasons : the title to relief depends on a legal right, and the court only exercises its jurisdiction on the ground that that legal right is established. One objection to granting an injunction in the first instance is, that it promotes after-litigation : the order either grants an injunction, and compels the plaintiff to bring his action, or suspends the injunction, with liberty to the plaintiff to bring an action. If you compel him to go to a court of law, you promote litigation, and this course is forced upon parties at a time when their feelings are deeply engaged in prosecuting their imaginary rights. There is also another objection, which is, that the court expresses a strong opinion, (and it ought to be a strong opinion,) and then sends the right to be tried : I think it better that the court should abstain from expressing such an opinion. But, after all, the chief objection is, that the court runs the risk of doing the greatest possible injustice. Consider what would be the result in the present case. If this publication is not permitted to be issued within the next month, the principal sale will be lost. This is clear—it is an almanack for 1847 ; and therefore, to restrain the defendant till, perhaps after the spring assizes, what use would it then be to him if he was found to be in the right. You would take money out of his pocket, and give it to nobody, and at the same time a great and irremediable injustice might be committed. If, on the other hand, the injunction is suspended, the defendant may make profits ; but if he is in the wrong, they will not be for himself, but for the plaintiff. Unless, then, the case is so clear, that there can be no reasonable doubt with regard to the legal right, it is better that the court should not exercise its equitable jurisdiction till the legal right is ascertained. As to the particular facts of this case : first, I throw out of consideration all that has been said about trade marks, as instanced in the cases of the articles of steel and blacking. With regard to steel, it can only be judged

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by external and well known marks ; and, therefore, to impress marks of the same kind, is to practice a deception on the public, and is consequently a fraud. So, also, in the case of blacking and other articles, where the eye does not aid the purchaser, and the mark is the only test that can be applied. In the present instance, if anybody is deceived, it is not by the eye, for anything more different than the two articles in question can hardly be conceived. The substance—the internal portion—is not alluded to. If, however, the parties separately sat down to invent a wrapper, there is certainly a remarkable coincidence in what they have produced. Both covers represent a portion of Greenwich Observatory, and profess the work to be for all sorts of persons. It is difficult to believe that this is all accidental ; but if it is a fraud, it is the most clumsy fraud that ever I saw, for it could deceive no one. I only refer to this, in order to show that I am not so satisfied that the plaintiff has a legal right, that I will restrain the defendant till he (the plaintiff) establishes his legal right. The case, therefore, falls under the principle on which, in other cases, I have before acted ; and I shall dissolve the injunction, the defendant undertaking to keep an account ; with liberty for the plaintiff to bring an action.

GOODHUE and others v. BERRIEN.

Where the witness sworn by a commissioner of deeds, to identify the grantor in a conveyance, on the latter's appearing to acknowledge the execution of such conveyance, is the grantee therein, or otherwise interested in sustaining its execution ; the certificate of the officer of its due acknowledgment, furnishes no proof of its execution.

A subscribing witness testified to his own signature to a mortgage, and that it was signed and acknowledged by a person who was introduced to him as the mortgagor. Another witness identified the signature thus made, as that of the mortgagor. *Held*, that the mortgage was sufficiently proved.

A mortgage, attested by a witness who was previously unacquainted with the grantor, is not an unattested conveyance within the meaning of 1 R. S. 738, § 137.

A mortgage was executed to secure sundry liabilities incurred for the accommodation of the mortgagor. It recited the execution of his bond of the same date and tenor with the mortgage, but no such bond was ever delivered. The mortgage was nevertheless held to be valid.

The mortgagee's claims which arose after the docketing of a subsequent judgment against the mortgagor, will be postponed to the judgment.

Where such a mortgage was given upon leaseholds and household furniture, but

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was not filed pursuant to the act of 1833, till seven months after it was given, was never renewed according to that act, and there never was any change in the possession of the furniture; it was *held*, that the entire mortgage was fraudulent and void as against creditors, although as to the leaseholds there was a change of possession.

The case of *Darling v. Rogers*, (22 Wend. 483,) commented upon. It does not sustain an assignment in part, where there is a corrupt intent apparent as to some other part of the instrument or of the property therein contained; but holds that if it contain a trust unauthorized by law, inserted without any corrupt motive, such trust is not evidence of fraud, and therefore does not avoid the other portions of the instrument.

Neither a *bona fide* debt nor an actual advance of money, will sustain a security infected with fraud.

April 8, 9; August 5, 1845.

THIS case came before the court, on exceptions taken by Jonathan Goodhue & Co., to the report of a master, on the claims to a surplus arising upon the sale of mortgaged premises, under a decree in the suit of John L. H. McCracken, against Charles Wollen and others.

The surplus was claimed by Daniel Berrien by virtue of a junior mortgage dated September 13, 1837; executed to him by Wollen, to secure notes, drafts, &c., signed for Wollen's accommodation. Goodhue & Co. insisting that this mortgage was fraudulent as against the creditors of Wollen, claimed the surplus by virtue of a judgment in their favor against Wollen, which was docketed April 25, 1840.

The master held Berrien's mortgage to be the prior lien, and that he was entitled to receive the whole surplus.

The facts appearing before the master so far as they are material to the points decided, are as follows.

Berrien's mortgage included Wollen's household furniture situated in the dwelling he then occupied, besides certain leases or terms of years; from one of which the surplus in question arose. The mortgage recited that it was given to secure a bond of the same date and tenor executed by Wollen to Berrien; but no bond was produced, and it appeared by Berrien's examination, that he never had any bond.

The mortgage purported to have been acknowledged by Wollen before a commissioner of deeds, in whose certificate it was stated

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that the identity of the grantor was proved to the officer's satisfaction by the oath of Daniel Berrien.

At a subsequent stage, the execution of the mortgage was further proved, by the testimony of the subscribing witness, (who was the before named commissioner,) and by proof of the handwriting of the grantor. It appeared that the mortgage was not filed in the office of the register of deeds, until April 13th, 1838; and was never renewed subsequently, by filing a copy. By the terms of the mortgage, Wollen was to pay all existing liabilities of Berrien and all renewals thereof, and indemnify him against all others, for three years. The proofs established that the liabilities of Berrien secured by the mortgage, remaining unpaid, and which had accrued prior to the entry of Goodhue & Co.'s judgment, considerably exceeded the amount of the surplus in question.

Berrien never took possession of any part of the movable property; some of it was shown to have been in Wollen's possession as late as 1841 and 1842; and Wollen had controlled and disposed of the residue. There was no objection made to the validity of the mortgage in respect of the possession of the leaseholds, and it appeared that Berrien took possession of the same about the time the mortgage was executed. Goodhue & Co. were creditors of Wollen, prior to the date of the mortgage.

J. A. Manning and C. Edwards, for Goodhue & Co.

S. H. Thayer and J. T. Brady, for Berrien.

THE ASSISTANT VICE-CHANCELLOR.—If it were clear that the identifying witness before the commissioner who took the acknowledgment of Wollen's mortgage to Daniel Berrien, was the mortgagee himself, the acknowledgment would be defective, and would furnish no proof of the execution of the instrument.

Although the testimony as to identity is for the satisfaction of the officer, yet his decision founded upon such testimony, to the effect that he is satisfied of the identity of the person making the acknowledgment, becomes by the statute as strong *prima facie* evidence of the due execution of the instrument, as his certificate

of the acknowledgment when he knows the party making it. And it cannot be tolerated that he should rely for proof of such identity upon the grantee in the deed, the execution of which is to be established by such proof. The grantee would not be competent in any court, to testify upon the question, if it became important to establish the identity; and the danger of frauds in the execution and recording of false deeds and securities would be even greater than it now is, if such a practice on the part of commissioners of deeds, were to be sustained by our courts.

It appears however, that there were two Daniel Berrien's, one of whom was distinguished as D. Berrien, Jun.; and as the word *Junior* forms no part of the name, (*Padget v. Lawrence*, 10 Paige, 170,) it is doubtful whether the court ought not to presume that the commissioner took the testimony of D. Berrien, Jun., for the purpose of identifying the mortgagor.

It is unnecessary to decide this, because the execution of the mortgage was sufficiently proved before the master, independent of the commissioner's certificate.

The subscribing witness testified to his own signature, and that the mortgage was signed and acknowledged by a person who was introduced to him as C. Wollen; and the testimony of J. L. Berrien identifies the signature thus made as that of C. Wollen. This was a competent mode of proving the execution of the mortgage, and sufficient if uncontradicted.

The mortgage was not an unattested conveyance within the meaning of the section of the revised statutes cited by the complainants counsel. (1 R. S. 738, § 137.) The object of the statute is to prevent the antedating of conveyances; and this is effected equally as well by the attestation of one who was previously a stranger to the grantor, as by that of one to whom he was well known.

It is next objected, that as the bond recited in the mortgage was never delivered to Berrien, the mortgage was not valid in its inception, and never had a legal existence. That there is no mortgage debt to sustain the mortgage. For the fact, reference is had to D. Berrien's affidavit before the master; and the same testimony shows in effect, that there never was any bond executed to him. The recital in the mortgage, mentioning a cotein-

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porary bond of the same date and tenor, is therefore erroneous. The mortgage was nevertheless delivered, and it aimed to secure liabilities which were in no manner dependent upon the bond recited, or upon any bond.

It does not follow that there was no debt secured by the mortgage, because there was no bond. The delivery up of a bond given with a mortgage, is evidence to show a discharge of the mortgage debt; but it does not show that no mortgage debt ever existed. There is testimony here from which to infer that the bond was delivered up, and the cases cited on that subject, are not applicable.

I will notice one other objection before proceeding to the main point in the case, which is, that there was no agreement for future advances expressed in the mortgage.

As to this, I think every claim brought forward by Berrien, falls within the literal terms of the condition of the mortgage.

I agree with Goodhue & Co.'s counsel, that the claims of Berrien which arose after the docketing of their judgment, cannot take precedence of the lien of the judgment. (See *Lansing v. Woodworth*, 2 N. Y. Legal Observer, 250; (a) *Craig v. Graham & Tappin*, before Assist. Vice-Chancellor, August 17, 1844.(b))

The most important objection to Berrien's mortgage is, that it was fraudulent and void as against the creditors of Wollen.

It contained various leaseholds; and also divers articles of household furniture, set forth in a schedule and valued at \$655.

The mortgage was dated and acknowledged on the 13th of September, 1837, but no copy of it was filed in the register's office pursuant to the act of 1833 relative to mortgages on personal property, until April 13th, 1838. It was never renewed after that period, as is required by that statute. It was thus distinctly fraudulent by the positive enactment of the act of 1833, so far as it was a mortgage of chattels.

Again, not an article of this personal property was ever taken into the possession of the mortgagee. The mortgage was payable at all events in three years; yet a year or two after that term

(a) Reported Vol. I., page 43.

(b) Now reported, ante, p. 78.

expired, some of the property remained in Wollen's possession. All of it was left with him, and continued in his possession until he made away with it, or it was otherwise dissipated. The statute declares that these circumstances shall be presumptive evidence of fraud, and unless rebutted they are conclusive.

No reason has been offered in proof for suffering the chattels to remain in the possession of the mortgagor. And for this cause therefore, the mortgage must be deemed fraudulent and void as to such chattels.

The case of *Darling v. Rogers & Sagory*, 22 Wend. 483, (S. C. 7 Paige, 272,) was cited to show that a conveyance fraudulent in part, might be sustained as to another portion of it; and it was urged that the mortgage was valid as to the chattels real which were embraced in it, even if it were void as to the chattels personal.

In the case cited, there was a provision for the trustees, in an assignment for the benefit of creditors, to mortgage real estate. This trust was unauthorized by the revised statutes, and therefore void. The assignment contained several valid trusts, and was in other respects unexceptionable; and the court of last resort, reversing the Chancellor as to the real estate, held that the provision being merely in contravention of a statute regulating estates in land and inserted without any corrupt motive or intent, did not taint with fraud the residue of the trusts, in the instrument in which it was found. (And see 8 Paige, 119, 120.)

The case is clearly distinguishable from the one before me. It appears that this mortgage was made with an intent to defraud creditors. Such intent is fastened upon it, not merely by the statutes which I have mentioned, but by the rule of the common law of which the statutes against fraudulent sales and conveyances were declaratory.

True the evidence of this intent is derived from the personal property exclusively, but in the eye of the law, it is a corrupt and fraudulent motive which influenced the act; and no one can imagine that any other or different motive dictated the insertion of the leasehold property in the mortgage, from that which is proved to have existed in regard to the personalty.

I cannot relieve any part of the instrument from the taint of

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fraud which is proved to pervade it in reference to the personal property.

There is in addition, some positive evidence of the existence of the intent which the law deduces from the circumstances already considered.

Berrien testified before the master, that he did not take possession of the furniture, because the mortgage was a friendly act, and he took it for nothing more than to keep the goods out of unfriendly hands. Farther on, it appears that Berrien's language in testifying, was, that the furniture was put into the mortgage as a cover.

Such being the testimony, and the inference of law upon the facts shown, the validity of Berrien's claims cannot sustain his security. Assuming them to be all that is claimed for them, (and the proofs sustain most, if not all,) the fraudulent intent saps the foundation of his mortgage. No *bona fide* debt or actual advance of money, will sustain a security thus infected.

The exceptions to the master's report are allowed, so far as to declare the mortgage fraudulent, and that Goodhue & Co. are entitled to the surplus money. They must also recover their costs of the litigation before the master and the proceedings there, except such as were necessary to establish Goodhue & Co.'s claim to the surplus as judgment creditors.

Neither party is to have costs against the other on the exceptions and the hearing thereon.

NEWCOMB, Administrator, &c. v. THE TRUSTEES OF ST. PETERS CHURCH and others.

Where a church claiming two legacies, as to which the executors entertained doubt, received the same from the executors, and executed to them a bond and mortgage for the amount, payable in three years; but which were given solely for their indemnity: it was *held*, after the lapse of twenty-six years, that the residuary legatees could not enforce the mortgage, although the church was not entitled to receive the legacies so paid by the executors.

The mortgage created no trust or confidence between the church and the residuary legatees; and the presumption from lapse of time, that it was paid or satisfied; is conclusive.

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A bequest to the free school of a church, the interest of which was to be appropriated by the trustees of the church for the use of the school forever, and if the school should not continue, then for the use of the church; was held to be a valid legacy.

Where a testator bequeathed the dividends of twenty shares of bank stock, and it appeared that he had such shares at the date of his will and afterwards bought eighty shares more; but sold the whole so that he had no such bank stock at his death; the legacy was held to be adeemed.

R. by his will, gave two legacies to a church, one of which was valid, and the other being specific was adeemed. He gave all his residuary property to two sisters, who resided in Ireland and who never visited this country. The executors, without fraud or collusion, in 1812 paid both legacies to the church and took from the church a bond and mortgage for their indemnity. In 1817, M. one of the sisters, filed a bill here against the executors for an account; and an account was taken by a master in 1822, pursuant to a decree. The payments to the church appeared in the executors accounts, and were allowed to them by the master. The master reported the sum due to B. the other sister, as well as to M., and the decree directed payment to them respectively; although B. was not represented in the suit. It also directed the executors to sell the real estate whenever required by B. and M., and to pay them the proceeds. M. received the amount decreed to her. In 1832 B. and her husband filed a bill here against the surviving executor for an account; which suit was continued by B.'s administrators; and in which a decree for an account was made; restricted to the basis of the account taken in M.'s suit in 1822. The master reported in B.'s suit, and in Feb. 1835 a decree was made in favor of her administrators, and also in favor of M.'s administrator, who had come in before the master. In 1835, B.'s administrators filed a bill to compel payment of the sum decreed to B. in M.'s suit in 1822; and the suit was settled on payment being made. In 1834, the heirs and legal representatives of B. and M. filed their bill against the surviving executor of R. praying the benefit of the decree in M.'s suit; and that he might sell the real estate and carry that decree into effect; and in 1836 a decree was made according to the prayer of the bill. During all these proceedings, the bond and mortgage of the church were unknown to B. and M., their representatives and legal advisers; they were not produced or mentioned in the suits; but they were not intentionally concealed or suppressed.

In a suit in 1842, by the administrators of B. and M., to have the benefit of the bond and mortgage; or to compel the church, or R.'s surviving executor, to refund the legacies; it was held, that the ignorance of M. and B. of the bond and mortgage was not material; the executors being liable to account to them irrespective of those securities. That M. was barred by the accounting in 1822. And that B. by adopting it in the subsequent proceedings, was precluded from questioning its correctness. Also that B. was barred by her suit in 1832 and the decree thereon.

Where on an executor's accounting under a decree, he is allowed for a legacy improperly paid; the adverse party cannot call the payment in question collaterally, or in another suit.

A legatee who goes in before the master, under a decree against an executor for an account obtained by another party, or who makes the result of such accounting

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the basis of a suit or decree for an account in his own behalf; will be bound by the account taken in such first suit.

March 6, 7; August 8, 1845.

THE bill was filed on the 16th day of March, 1842, by William Newcomb as administrator with the will annexed of Mary Mathews, and by W. Newcomb and James McBride, as like administrators of Bridget O'Brien, against Cornelius Heeney as surviving executor of Mathew Reed, the Trustees of St. Peters Church in the city of New York, and James Kerrigan.

Mathew Reed who died in 1811, left a will dated in 1802, by which he appointed Andrew Morris, Charles McCarty and the defendant Heeney, his executors. He gave all his residuary property to his sisters, Mary Mathews and Bridget O'Brien, who resided in Ireland; one-third to the former, and two-thirds to the latter. Among other bequests was the following: "I bequeath to the parish clergy of St. Peters Church the dividend of twenty shares I hold in the Manhattan Company, or bank, and every dividend that is received by them to offer up four masses for the repose of mine and my father's, mother's, and relations souls, and I do appoint the trustees of St. Peters Church to receive said dividends or interest as it becomes due and pay it to said clergy or priests for the above purpose." And out of the residue of his personal estate he gave thus, "I bequeath to the free school of St. Peters Church the sum of two thousand dollars to be laid out in public stock, such as my executors will think most safe and beneficial, and the interest arising from said stock or shares to go and be appropriated by the trustees of said church to the use and support of said school forever, and in case the said school shall not continue, then the interest of said shares to go to the use and benefit of said church."

At the date of the will the testator owned twenty shares of Manhattan stock. He afterwards bought eighty shares more, and in January, 1809, sold the whole. He owned no stock in the company at his death. He was a pewholder and worshipper in St. Peters church, and there was a free school attached to the church at the time he made his will, and subsequently till long

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after 1812. All the executors proved the will, but the management of the estate devolved principally on McCarty.

In July, 1812, the executors paid to one of the clergy of St. Peters Church, one year's interest on \$1000 which sum was the par value of twenty shares of Manhattan Company stock. And on the 14th of September, 1812, they paid over to the trustees of that church \$3000, being the amount of the legacy for the free school, and the value of the twenty shares of stock.

On the 20th of October, 1812, they took from the corporation of St. Peters, a bond and mortgage to them as executors, for the \$3000, conditioned for its payment with interest on the 20th day of October, 1815.

The proof of the execution of these instruments as against the corporation, was objected to, and was much discussed at the hearing; but it became unimportant in the view taken of the case on its decision. The bond and mortgage were never recorded. They went into the possession of McCarty, and continued in his possession and that of his executors, till about the time of filing the bill in this cause.

Mary Mathews and Bridget O'Brien always resided in Ireland, and were never in this country. In 1817, Mary Mathews exhibited her bill in this court against Reed's executors for an account of his estate. Morris and Heeney answered the bill; but McCarty died before answering, and in 1821 the suit was revived against his executors, who put in an answer. On the 2d of April, 1822, a decree was made by the Chancellor directing a master to take the accounts. They were accordingly taken by Jeremiah I. Drake, one of the masters of the court, whose report is dated November 12th, 1822. By his report it appears that he allowed to the executors of Reed in their discharge, the payments to St. Peters Church, and they appear in his report in these words,

"1812, July 23d, to check to Reverend Mr. Holkman for one year's interest of \$1000 bequeathed to St. Peters Church, 70

Sept. 14, to check to church in full of legacy, 3000."

The master reported a sum due from the executors of Reed, and apportioned the same between Heeney, Morris, and McCarty's executors. He also reported how much of the same was due to Mathews, and how much to O'Brien.

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The cause was brought to a hearing on the 29th of November, 1822, and a decree made, confirming the master's report, and directing payment to be made by the respective defendants to Mathews and O'Brien respectively. It also directed Reed's surviving executors to sell the real estate whenever requested by O'Brien and Mathews, and to divide and pay to them the proceeds according to Reed's will.

Mary Mathews received the sum awarded to her by this decree.

In January, 1832, Bridget O'Brien and her husband Terence, filed their bill in this court, against Heeney, who had then become the sole surviving executor of Reed, (in behalf of all the other legatees, &c., as well as themselves,) for an account of the estate of Reed, and especially of all which he had received or then held. T. O'Brien and his wife both died, pending this suit, and it was revived in favor of Newcomb and McBride, her administrators. In 1835, those administrators filed a bill in this court against Cooper as surviving executor of McCarty, to compel him to pay the sum decreed against McCarty's executors in favor of Bridget O'Brien in the suit of Mary Mathews by the final decree in 1822. This suit was settled by Cooper's paying to those administrators, upwards of \$600.

The suit commenced against Heeney in 1832, came to a hearing, and a reference was made to a master to state an account, but the master was restricted by the order, to the basis and footing of the accounts stated by master Drake. An account was taken accordingly by Benjamin Clark, one of the masters, and a balance reported against Heeney, for which a final decree was made in February, 1835, in favor as well of the administrator of Mary Mathews who had come in before the master, as of O'Brien's administrators.

In 1834, the present complainants, with sundry heirs of Mathews and O'Brien, exhibited their bill in this court, against their co-heirs, and against Heeney as surviving executor of Reed, in which they set forth the proceedings and decree in Mary Mathews suit, and prayed the benefit of that decree, and that Heeney might sell the real estate of Reed, and that the decree might be carried into effect. In October, 1836, a decree was made in the suit commenced in 1834, directing the former decree to be carried

into effect, and the real estate to be sold and distributed accordingly.

All these decrees were duly enrolled. In 1842, Newcomb obtained the bond and mortgage executed by the church, and thereupon this suit was commenced.

The bill charged that the payments to the church in 1812, were unauthorized and illegal. That O'Brien and Mathews, and their administrators, never knew or heard of the bond and mortgage till the latter heard of them in 1842. That their existence was fraudulently concealed and suppressed on the accountings in 1822, and again in the suit of O'Brien's representatives; and that the corporation of the church had colluded with the executors. That the bond and mortgage were taken for the benefit of the residuary legatees, and were in trust for them, and enured to their benefit. And that the complainants did not discover the alleged frauds until 1842.

The bill required an answer on oath, and prayed for a foreclosure of the bond and mortgage, or that the church might be decreed to refund the legacies and interest. It also prayed for a decree against Heeney for the amount of each of the legacies and interest. James Kerrigan was made a defendant as a subsequent mortgagee of the premises; but as he denied notice and none was proved, his prior right was not contested.

In their answers, the corporation denied the bond and mortgage; insisted upon the bar to them by lapse of time; upon the limitations prescribed by the revised statutes; and upon the confirmation of the payment of the legacies, by the various chancery suits and accountings before mentioned.

Heeney in his answer, pleaded the same bars to the complainants demand. He stated that the bond and mortgage were devised and executed after the legacies were paid, on a suggestion that it might happen that the payments to the church might not be approved of and confirmed by the legatees, and consequently the executors might be made personally liable; and the bond and mortgage were given as a pledge for the faithful application of the trust monies by the trustees, and as an indemnity to the executors in case the legatees refused to confirm their acts.

Not having seen them since 1812, he says he had forgotten

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their existence before the first accounting, and they did not occur to him until in 1841 or 1842, when called upon by Newcomb. He denied all the fraud charged and all collusion.

No interest had ever been paid on the bond and mortgage, and there had been no recognition of them on the part of the corporation, since they were executed.

The cause was brought to a hearing on the pleadings and proofs.

H. S. Mackay and B. F. Butler, for the complainants.

C. O'Connor, for the defendants.

The following points were made for the complainants.

1. The bond and mortgage made by St. Peters Church are ancient, and such as do not require to be proved, or proved strictly, although they are from the testimony fully established as the deeds of the defendant.

2. They were not taken, nor do they exist as ordinary outstanding securities for monies belonging to the estate of Mathew Reed, which the executors had the right to make their own, and for which they have at any time accounted in the usual way to the estate, but were peculiar and made for specific portions of that estate, set apart in provisional security for the benefit of the residuary legatees, to be made use of whenever being known to them, it should appear that the appropriation of the monies to the use of the church was not authorized by the will.

3. That hence the bond and mortgage, under the circumstances, stood and now stand in judgment of equity, as securities in the name of the executors for such monies, from which a trust resulted to and for the benefit of the legatees or their legal representatives.

4. That the bond and mortgage were concealed and kept from the knowledge of the legatees, from the time of making the same until in or about the month of February, 1842; when the same were first discovered by one of the present complainants; which amounted to a fraud in law and equity on the rights of the legatees and their legal representatives.

5. That by giving or advancing the monies to the church and taking back as countervailing securities, and for indemnity against such advance, the bond and mortgage, the payment to the church, (charged in the accounts of the executors referred to in Master Drake's report,) were not *absolute* but *contingent*, and continued to be dependent on the right of the executors to make such advances, which could only be tested when the bond and mortgage were known and the facts fully disclosed.

6. It hence became and is the right of the legatees or their representatives, to open the accounts or alleged payments, without regard to lapse of time; as under the circumstances, neither the legatees or their representatives had any knowledge of the bond and mortgage or countervailing securities against such payments, out of which their rights arose, until a very recent period before filing this bill.

7. That the various suits and accountings, that have taken place in reference to the general assets and outstanding securities of the said estate, do not debar the complainants or affect their rights in the premises, as they all took place in their ignorance of the existence of the bond and mortgage for their benefit as countervailing securities, and while the same were fraudulently concealed by the defendants.

8. That no acquiescence of the complainants in the correctness of the advances made to the church is to be inferred, as besides the fraud, the legatees themselves were never in this country, and so far as they may be chargeable with implied notice, they were only bound to know what purports on the face of the account to have been an absolute, fair, outright and honest payment, by the executors to the church, according to the will; and they could not know otherwise, until they were informed of the counter or explanatory securities existing in said bond and mortgage, which reserved and secured to them their rights.

9. That the fraudulent concealment of the bond and mortgage, is evinced by the executors refusing and neglecting to set forth the same, in any account exhibited by them of the estate, as good faith and honest dealing required them, when claiming the benefit of the payments or advances to the church, to state the countervailing securities which were concomitant and co-existent

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with such payments or advances, or else to disclose the same among the general outstanding securities.

10. That if it be admitted that the bequest of \$2000, to the free school was properly paid to the trustees of the church, yet at all events as to the sum of \$1000, part of bond and mortgage, advanced to the church as an equivalent for the alleged specific legacy or bequest in the will of the dividends of twenty shares of the Manhattan Company, to the parish clergy of the church, the bond and mortgage still subsist as securities for that amount with interest, inasmuch as such bequest or legacy was adeemed, and had no existence in law or equity on the death of the testator, by reason that the bank shares were sold by the testator before his death. Nor were the executors authorized to substitute such payment in place or stead of the bank shares, or to pay the same in any manner, and hence on the execution of the bond and mortgage, the same enured for that amount at least, to the benefit of the sisters of the testator who were his residuary legatees, and whose representatives are now entitled to claim and demand the same.

11. That the defendants, the trustees of the church, ought to account for and refund the amount of \$1000 with interest, by virtue of the bond and mortgage; and in case of their default, the surviving executor Cornelius Heeney, ought to do so, on the ground that he has by his concealment of the bond and mortgage, and neglect to enforce the same against the church, assumed the responsibility thereof, and produced the loss of the same to the complainants to the extent above stated, together with the seventy dollars paid out of the funds of the estate to the Rev. Mr. Holkman, as interest on the \$1000, with interest thereof.

12. The complainants therefore, claim a decree in this cause, that the bond and mortgage as to the \$1000 and interest, be enforced against the church in the usual manner, or if not, or if the church should not pay the same, that the defendant Cornelius Heeney, be compelled to do so, together with the seventy dollars and interest, and the costs of this suit.

In behalf of the defendants, St. Peters Church, the following points were made.

I. The legacy to the school is clearly valid; and the complainants are consequently entitled to no relief in respect thereof.

II. The legacy to the clergy being for pious uses, should be supported.

1. A gift of the profits is a gift of the thing.

2. Stock or its equivalent, ought to be purchased as a substitute, if the testator had no stock when he died.

III. If there was any mistake of law or fact, irregularity, or even fraud, in the payment of the \$3000 to the church; the parties in interest by long acquiescence, after full notice, ratified, and adopted the payment.

1. Ignorance that the executors had taken a mortgage security against their possible disaffirmance, in lieu of a refunding bond, would not prevent their approval of the payment, with notice of the terms of the will, operating as a ratification.

a. The nature of the gift, coupled with the fact of their coinciding religious opinions, favors the idea of a ratification.

b. The objections to the validity of the gift are technical, and *stricti juris*. They are not equitable, or to be favored; and are such as, under the circumstances of this case, it is to be presumed the parties would waive.

IV. There is no sufficient evidence that the alleged mortgage produced in evidence, is the act and deed of these defendants.

1. No proof of seal.

2. No proof of delivery.

3. The trustees had no power to convey.

V. The alleged bond and mortgage, if ever sealed with the seal of the church, is invalid because given to persons whose presence was necessary to form a quorum of the trustees.

VI. The alleged bond and mortgage, not having been in any form acknowledged or recognized as a valid security for more than thirty years, is barred by lapse of time.

VII. The proceedings had in this court by the complainants, and set forth in the answer, form a perfect bar to all the relief sought by the bill in this cause.

VIII. The complainants having persisted in this harsh claim, in the face of full notice of its unfairness and illegality, they ought to be charged with costs.

THE ASSISTANT VICE-CHANCELLOR.—I will first consider the case as it is made out against St. Peters Church.

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Without expressing any opinion as to the sufficiency of the proof of the execution of the bond and mortgage, or as to its being originally a valid corporate act ; I think there is an insuperable difficulty in the way of any decree against the church for its payment.

More than twenty-six years had elapsed after the bond and mortgage became due, before this suit was commenced. The mortgagees were all residents of this state ; and there is no evidence of any recognition whatever of the mortgage by the corporation or its officers during the whole of that period. The presumption that the mortgage was paid or satisfied, arising from the lapse of time, is conclusive, unless there is some circumstance in the case which takes it out of the general rule.(a)

The complainants rely upon two points as obviating the force of the rule ; first, that there was a trust ; and second, that there was fraud. As to the trust, whatever there may have been in regard to the executors, there was none between the church and the legatees. The church claimed the two legacies, and so far as I can discover, claimed them in good faith. Whether they had any right to them or not, is a different question, and quite immaterial to the present inquiry. The executors paid them to the church, but having doubts as to the legality of the claim, took the bond and mortgage for their indemnity. If the payment turned out to be unauthorized, the executors would have been compelled to pay the amount to the testator's sisters, but the latter would have had no direct remedy against the church. The extent of their possible right to enforce the mortgage was this. If the executors had proved to be insolvent, so that the sisters could not collect the unauthorized payments from them, equity would have permitted them to enforce the bond and mortgage against the church ; either as a security held by their debtors which in such a case ought to enure to their benefit, or on the same principle that they might pursue a specific chattel of theirs, which could be identified, in the hands of a third person. But there was no trust or confidence, in regard to the transaction, existing between the church and those legatees.

(a) See *Campbell v. Graham*, 1 Russ. & Mylne, 453.

So as to the fraud. Much that I have said is applicable to this point. There is no trace of any collusion between the church and the executors, either in the payment of the two legacies, or in concealing from the residuary legatees the existence of the bond and mortgage. And unless there was bad faith in obtaining the payment, or a fraudulent collusion subsequently, I do not see how the charge of fraud against the church is to be sustained.

Aside from the bond and mortgage, the legatees have still less ground for exacting from the church, a return of the sums paid to the latter in 1812.

If there were any error in the payments, it was one of law as to the validity of the two legacies, so that the executors could not recover them back; much less could other legatees reclaim them in the absence of fraud or mistake of fact. And as to the residuary legatees, if the church had no other ground of defence against them, their acquiescence in the payments in the various proceedings in this court against the executors, constitutes an effectual bar to reclaiming such payments at this day.

The bill must therefore be dismissed as to St. Peters Church, and the defendant James Kerrigan.

SECOND. The claim made by the complainants against Heeney, the surviving executor of Reed.

As I have no doubt of the validity of the legacy of \$2000 to the free school of St. Peters Church, this part of the investigation may be limited to the legacy of the dividends of twenty shares of Manhattan stock.

The twenty shares of stock were of the par value of \$1000, but having been sold by the testator in his lifetime, the legacy was unquestionably adeemed.^(a)

The executors nevertheless paid one year's interest to the church on the \$1000, at the end of a year from the testator's death, and in less than two months after such payment, they paid the whole sum to the church, with the other legacy of \$2000. The mortgage was not taken till more than a month after paying the legacies.

(a) See *Robinson v. Addison*, 2 Beavan, 515.

Newcomb v. St. Peters Church.

1. How does the case stand in reference to the administrator of Mary Mathews?

In 1817, she filed a bill in this court, against Reed's executors for an account, which she prosecuted to a final decree. The accounts of the executors were taken by a master in that suit, in 1822, when these transactions were comparatively fresh, and when the two residuary legatees were living, and competent to judge of the propriety of the payment of the legacy of \$1000, under the circumstances, and Mary Mathews was competent to affirm it.

All the payments to the church were brought forward by the executors in that accounting, and were allowed by the master. They appear in his report so plainly and distinctly, that they could not have been overlooked or misunderstood by Mathews's agent, or her solicitor or counsel. The master's report shows how the word *check* came to be appended to nearly all the discharges credited to the executors, which was by reason of his using their bank book entire, for both charges and discharges. No exception was taken by Mathews to the report. On the contrary, she immediately obtained a decree upon it, and received the sum which was thereby awarded to her.

Her suit was founded on the will of Reed. She therefore knew of the gift of the Manhattan stock. The executors accounts before the master showed that they received no such stock, because there is no credit or statement for either the stock or its proceeds. The same accounts showed to her that they paid cash to the church, both interest and principal, and that they had not either paid dividends on the stock or transferred the stock itself.

Mary Mathews, (or those acting for her, which is the same thing,) knowing all these matters, either opposed the allowance of the payments, or assented to their propriety.

If she contested them, the decision of the master concluded her. It is more probable, and more creditable to her to believe, that she cheerfully acquiesced in the payment by which her brother's pious provision for masses for the repose of his soul and those of his relatives, was carried into effect. To her, if educated in the same faith, this doubtless appeared to be a holy and most sacred object, although to others it may seem superstitious.

On every hand, it therefore appears that she was concluded by the accounting in 1822.

The complainants attempt to avoid this conclusion, by showing that the confirmation of the payment of the legacy was made in ignorance of the existence of the bond and mortgage; and that their existence was fraudulently concealed from the residuary legatees, by the executors.

Heeney's answer shows that the bond and mortgage were not produced before the master on the accounting. But there is no fraudulent suppression or concealment of them established. The answer of Heeney, which is responsive to the strong charges in the bill on this subject, as well as to the interrogatory thereon, is proof in his favor that there was no fraud or suppression, and that he had forgotten the existence of those securities.

It thus appears that they were not produced, but that the omission was not intentional. The executor who had originally taken and retained them, was at that time dead; and there is no proof of any suppression or concealment on the part of the other executor, Morris.

I think it should be assumed that the residuary legatees, were ignorant of the existence of the bond and mortgage.

The sole question as to Mary Mathews, is thus reduced to this point; does her ignorance of that fact, impair or destroy the effect of the allowance of the payments to the executors, by the master on the accounting?

If she contested the allowance, her ignorance was perfectly immaterial, because the bond and mortgage would not have made the payment any more or any less valid. I have supposed it probable that she did not contest it. If I were to act on that probability, instead of proof, it is based on her regard for her brother's wishes, and upon her supposed religious views and belief. In respect of these also, the bond and mortgage could have had no influence.

It was urged that she may have confirmed the payments, because she supposed their disallowance would work a total loss of the amount to the executors, or subject her to a quarrel with her mother church. I cannot give any heed to the suggestion that the idea of a loss to the executors influenced Mathews or her

Newcomb v. St. Peters Church.

agent in the slightest degree ; for the master's report contains many charges made against them *strictissimi juris*, and shows that the accounting was rigid and unrelenting on the part of the complainant. As to the other suggestion, fear of the church, it certainly would have been quite as cogent a motive if she had known all about the bond and mortgage. An attempt to reclaim the money thus devoted and used for masses for her dead kindred, would have been as sacrilegious and as likely to lead to anathema, if it were made through these securities by Mary Mathews, as if it were pressed through a suit against the executors.

In my judgment, the existence of the bond and mortgage was in no wise material to be made known to her, and the accounting is equally conclusive as if she had known all the facts connected with them.

The will, the payments and their time and manner, their legal effect, and the fact that there was no Manhattan stock, are to be taken as fully within her knowledge. Her remedy was a plain one ; it was against the executors, and it is not disputed that they were able to respond to it. Whether they were ultimately to lose the amount paid, or had indemnity for it, was a matter of entire indifference to her and to her rights.

The answer of Heeney proves that the bond and mortgage were a subsequent act ; and were in truth for the sole indemnity of the executors, embracing both the valid legacy, and the one which was adeemed. To the executors, they were equivalent to the bond which the statute then prescribed to be given by legatees on receiving payment, (1 Rev. Laws, 314, § 18.) They were not an investment, and the executors could not have turned them over as such to either of the legatees, without her consent.

The fact that these executors had taken such indemnity, could not in any degree influence the legal conclusion of the master or of the complainants, in regard to allowing them for the payment of the legacy of \$1000. And if I am to speculate on the motives, which aside from an erroneous conclusion as to the validity of the legacy, influenced its allowance, I find they are motives that would not have been affected by a knowledge of the bond and mortgage.

I must therefore, hold that Mary Mathews was barred by the accounting before the master. I have not considered whether the effect would have been otherwise, in case a knowledge of the bond and mortgage had been important to her allowance of the payments.

2. The administrators of Bridget O'Brien present a different case in some particulars, from that of Mary Mathews.

Provision was made for her in the decree in Mathews's suit, and the accounting before the master embraced not only the whole estate to that time, but also the separate payments made to the residuary legatees.

There is no evidence however, that she was a party to that suit; by going in before the master or otherwise; and the accounting and decree would not of themselves affect her rights. But it appears that she subsequently filed a bill founded upon the decree, to recover of the executors of McCarty the sum thereby directed to be paid by them to her; and she received such sum or a part of it, from them in consequence of that proceeding.

It is in vain to say that it does not appear that she knew of any thing more than the decree. The law charges her with notice of all the proceedings in the suit which led to the decree, so far as they were on record and affected her rights; and she could not shut her eyes to the contents of the executors accounts, while she availed herself of the balance found and reported by the master, and decreed by the court.

I think that her representatives are precluded by these circumstances, from going back of the accounting in the suit of Mathews.

It is indifferent to this conclusion, whether Bridget O'Brien was a feme covert or not in 1822. If she were, the legacy was recoverable by her husband, and his suit for it would bind her, so far as this question is concerned.

Another and a conclusive bar to her administrators, is found in the decrees and other proceedings in the suit instituted by Terence O'Brien and his wife in 1832, and revived by her administrators. That was a bill for a general account of the administration of Reed's estate. The decretal order in that suit directing a master to take the accounts, is limited to the time subsequent to

the Mathews decree, and adopts the result in the Mathews accounting, as its basis for the previous period; and the same ground was taken by Heeney before the master, and was adopted by him. The decrees in the O'Brien case, decide that the accounting in 1822 is binding upon Mrs. O'Brien's representatives, as well as upon those of Mathews. They are a judicial determination of the point, which is not to be drawn in question in this court.

The silence of Heeney on this reference in regard to the bond and mortgage, is alleged to be fraudulent. There is the same answer to the fraudulent intent as was given before. But there was less reason for his remembering the securities on this occasion, than there was on the reference before Master Drake, thirteen years before. The legacies to the church were allowed in 1822, and the account closed. They were not in controversy in 1835, and could not be controverted under the decretal order in the suit of O'Brien's.

On whatever ground the court proceeded in 1835, in holding the former accounting binding upon the O'Brien's, the decision cannot now be disturbed.

If it be said that the force of the decrees in the suit of O'Brien's administrators ought to be in any manner influenced by her and their ignorance of the bond and mortgage; the considerations which I have already mentioned in reference to Mary Mathews, are applicable to this argument in behalf of Mrs. O'Brien.

The bill must be dismissed as to the defendant Heeney.

The question of costs is not without its difficulty. I think upon the whole, that the suit is not wantonly brought against either of the defendants, and the bill will be dismissed without costs.

INDEX.

A

ABSOLUTE OWNERSHIP, SUSPENSION OF

See TRUSTS, 15 to 17; 22 to 28.

ACCOUNT.

1. The complainant was vested with the title to certain real estate, in trust for the benefit of himself and various other persons owning unequal and distinct, but undivided shares therein. He was to employ an agent or substitute to manage and sell the property, and he was not required to act himself further than to execute conveyances, and was to be liable only for gross misconduct or neglect.

On a bill filed to settle the accounts of the trustee, sell the property, reimburse his advances, and wind up the trust, all the other shareholders were made defendants, together with two persons who had successively been agents or substitutes of the trustee, and whose accounts had never been adjusted. These persons were also original shareholders, and the bill sought to have their accounts settled and closed.

A demurrer to the bill for multifariousness was overruled. *Kent v. Lee*, 105

2. Under a decree for an account of joint operations in real estate, the master was directed to allow no commissions. *Held*, that this excluded an allowance for superintendence and management of the joint property. *Stevenson v. Maxwell*, 273

3. The agreement under which the account was directed, was to make advances for a

purchase. The account embraced those, with large disbursements also, and the decree restricted interest on all *advances* to six per cent. *Held*, that the disbursements were not included in the restriction. *id.*

See CONFIRMATION, 2, 3.
COSTS, 3.

ACCUMULATION.

See TRUSTS, 23 to 28.

ACKNOWLEDGMENT.

See DEED, 10 to 12.

ADEMPTION.

See LEGACY, 8.

ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS.

ADVANCES.

See ACCOUNT, 3.
MORTGAGE, II.

AGENT.

See ACCOUNT, 1.
PRINCIPAL AND AGENT.

AGREEMENT.

1. The court of chancery does not interfere, by way of decreeing specific or further performance, with executed agreements. *Tucker v. Clarke*, 96

2. Where parties supposing that they were seised, sold and conveyed lands, with covenants of seisin and warranty, to which as it subsequently appeared, they had no title; and six years afterwards, on being sued by their grantee on the covenant of seisin, purchased the lands of the true owners, and tendered a new conveyance thereof to the grantee, who refused to accept it; *Held*, that the court had no power to compel the grantee to receive the deed, or to interfere with his action on the covenants of title. *id.*

3. Two Lutheran churches or religious societies, each owing temporalities, though of unequal value, entered into an agreement for a union, to remain forever as one body, congregation or society, by a new name expressing such union; and by which their estates were to be consolidated for the common use and benefit, and the charge of their estates and concerns was intrusted to officers to be chosen out of the united congregation; with other provisions showing an entire union and consolidation into one body; and the agreement also provided that out of the property, the ancient church of one of the constituent societies should be rebuilt on the site where its ruins stood, for the use of the united congregation as soon as circumstances would admit.

The united body was immediately afterwards incorporated by the name agreed upon, and after twenty years, the corporation sold the site of the ancient church, and never rebuilt it.

In a suit brought by persons claiming to be corporators in the united church, and to be in part the representatives of the ancient congregation which owned such site, to compel the corporation to build and endow a church in pursuance of the terms of the union:

Held, 1. That all the property of the two churches became vested in the incorporation.

2. That the management and control of the same vested in the trustees as a distinct body, and to the exclusion of the elders and deacons.

3. That the same vested in the corporation as an individual body or unit, in trust for the maintenance of the faith, doctrines and discipline of the Evangelical Lutheran Church; and not for the benefit of the two former congregations connected together

for certain purposes. The existence of both was merged in the union.

4. No member of either of the former churches had any greater, better or different right in the incorporated society, than the members of the other. The rights of all were equal and upon a common footing. And if the ancient site of the one had been built upon, the rights of the members of both in such edifice would have been equal in all respects.

5. That the agreement for the union did not constitute a trust or a covenant, for the rebuilding of such edifice on the ancient site, or elsewhere. It was merely an expressed intention, which the corporation and subsequent corporators might execute or waive, in their discretion.

6. If there had been a trust, the court from the lapse of time and the circumstances, would presume that the sale of the site and other appropriation of the fund, were by the direction and with the consent of those interested. *Cammeyer v. United Lutheran Churches, &c.*, 186

4. An offer to sell land at a fixed price, without more, is an offer to sell for cash. *id.*

5. The acceptance of such an offer, to bind the seller, must be simple, and without the addition of any new terms or qualifications. *id.*

6. Since the revised statutes, contracts for the sale of lands resting upon mutual promises, must be subscribed by both the buyer and the seller, to be obligatory upon the latter. *id.*

See COMPROMISE.

DEEDS, 3 to 8.

FRAUDS, STATUTE OF.

INTEREST, 8 to 14.

MORTGAGE, 38.

PARTNERSHIP, 1 to 5.

SPECIFIC PERFORMANCE, 2 to 5.

ALIEN.

See CORPORATIONS, 11.

TRADE MARKS, 6, 7.

ALLOWANCES.

See ACCOUNT, 2, 3.

AMENDMENT.

See PRACTICE, 15, 16.

ANNUITY.

See WILL, 31 to 42.

APPEAL.

See PRACTICE, 23.

ARREARS.

See WILL, 31 to 35.

ASSESSMENTS.

1. In estimating and awarding the damages to the owners of lands required for opening and widening streets in the city of New York, the commissioners of estimate and assessment should consider separately the distinct existing interests in each portion of such lands, (e. g. those of landlord and tenant,) and make a separate award of the damages to each. *Coutant v. Catlin*, 485
2. Where their report shows such a separate award, neither party after its confirmation, can impeach its accuracy or have it modified, by showing any error or omission. *id.*
3. But where the report awards all the damages to one of several parties interested, and there is no award to either of the others; it is competent for the latter to prove their interest, and recover from the former their proportion of the award. *id.*
4. *Held*, accordingly, between a landlord, and a tenant who was entitled to remove his buildings at the end of his term, where the improvement required the buildings to be demolished, and a single award for the whole damages was made to the landlord; it appearing conclusively that a specific part of the damages was assessed by the commissioners for the buildings. *id.*

ASSIGNEE.

See MORTGAGE, 29, 30.

ASSIGNMENT.

See DEED, 9.
MORTGAGE, 39 to 41.
RECEIVER, 1 to 4.

ASSOCIATIONS.

See CHARITABLE USES, 9, 10.

ATTORNEY.

See MORTGAGE, 2 to 4.
NOTICE.
PRINCIPAL AND AGENT.

AUTHORITY.

See POWERS.
PRINCIPAL AND AGENT.

AWARD.

See ASSESSMENTS, 1 to 4.

B

BANKING ASSOCIATIONS.

1. An association organized under the act to authorize banking, contracted in the name of its president describing him as such. *Held*, the identity being clear, that the contract was valid *Boisgerard v. The New York Banking Company*, 23
2. A variance in the use of the name of one of these associations does not vitiate its contracts. In this respect they are governed by the same rules as corporations at common law. *id.*
3. The bank obtained a loan of money on a sealed agreement, which, as it was contended, was illegal because the cashier did not sign it, according to the provision of that act. The bank had no cashier at the time. *Held*, that the lender might recover the money loaned, whether the agreement were defectively executed or not. *Semb.* that its execution was sufficient. *id.*
4. Such banking associations, are within the provisions of the revised statutes relative to proceedings against corporations in equity; and on their failing to comply with the act of 1841 regulating their annual returns, they are liable to be treated as insolvent corporations under those provisions. *id.*

BANKRUPT.

1. Where a debtor was declared a bankrupt

- under the act of congress of 1841, upon a petition filed after the commencement of a judgment creditor's suit against him in the court of chancery; it was *held*, irrespective of the proviso in the second section of the bankrupt act, that the assignee in bankruptcy took the debtor's things in action, subject to the creditor's lien acquired by the suit. *Storm v. Waddell; De Kay v. Waddell*, 494
2. *Held* further, that the right of the judgment creditor in these cases, constituted a lien or security, within the meaning of the proviso in the second section of the act, and is protected thereby. *id.*
 3. The word "*securities*," in that proviso, is used in its popular sense, and includes every interest or right attached to, or which is a charge upon, specific property, or which entitles the owner of such right or interest to be paid out of specific property; whether the right be legal or equitable, absolute or contingent. *id.*
 4. The term "*liens*" in the same proviso of the bankrupt act, is not limited to mere common law liens which are lost whenever their owner parts with the possession of the property. It embraces all cases in which real or personal property is charged with the payment of any debt or duty, without regard to the possession of the property, or the legal or equitable nature of the duty imposed. *id.*
 5. A discharge of the debtor, in bankruptcy or insolvency, from his debts, pending a judgment creditor's suit, does not operate to discharge or impair the lien acquired by the commencement of such a suit. The suit may proceed *in rem*, although the person and the future assets of the debtor may in the meantime be exonerated. *id.*
 6. An assignee in bankruptcy may avoid an assignment executed by the bankrupt in fraud of his creditors, before the passage of the bankrupt law; but if a judgment creditor files a bill to set aside the assignment, before the proceedings in bankruptcy are instituted, and duly prosecutes his suit; he thereby acquires a lien which cannot be divested or impaired by the assignee in bankruptcy. *id.*
 7. This was held in a case where the bill was filed, the subpoena to answer served, and the order for a receiver made, before the petition in bankruptcy was presented to the U. S. District Court; although no receiver was appointed until after the debtor was decreed to be a bankrupt. *id.*
 8. The fund in controversy being in the custody of the officers of the court, it was ordered to be paid to the complainant in the creditor's suit, in preference to the general assignee in bankruptcy. *id.*
 9. After a debtor had been decreed a bankrupt and before he was finally discharged, a judgment creditor's suit was commenced against him, and the creditor claimed to have discovered a piano, which he was entitled to have applied towards his debt. The answer set up the bankrupt proceedings and the debtor's discharge. *Held*, that if the piano were acquired by the debtor prior to his bankrupt proceedings, it became vested in his assignee by force of the decree; and if it were acquired subsequently, the discharge was a bar to the creditor's claim in respect of his judgment. *McCabe v. Cooney*, 314
 10. In setting up a bankrupt discharge as a defence in an answer, it is not necessary to use the same precision, and certainty that is requisite in a plea. *id.*
 11. An answer stating that the defendant made his application, and showing its terms; that he then resided in the district where it was made; that he was a bankrupt within the act of congress, and was owing debts which were not contracted as executor, &c.; that upon regular proceedings had in the District Court he was decreed a bankrupt and the decree is still in force; and that upon further regular proceedings, he was discharged from his debts by a decree of the court, and received a certificate; the certificate of discharge being then set out at length; was held to be sufficient as a pleading, to establish the defence. *id.*
 12. It is not necessary in such an answer, to allege that the complainant's debt was not within the class of debts which are excluded from the operation of the bankrupt law. If the complainant intends to insist that his debt was one of that class, he must state the fact in his bill, as he would any other matter of avoidance. *id.*

BANKS.

See BANKING ASSOCIATIONS.

BENEFICIARY.

See TRUSTS, IV.

BILL.

See PLEADING.

BILL OF EXCHANGE.

1. Where an indorser, discharged by the laches of the holder, with full knowledge of the facts, yields to the claim of the holder and promises to pay the note, an action on the note can be maintained on such promise. *Brooklyn Bank v. Waring*, 1
2. W. was the accommodation indorser of his son N., on a note to B., payable at the complainant's bank, on the 31st July. By an error of their clerk the note when left for collection, was entered as due 31st August, and was not presented for payment at its maturity, nor any notice of its non-payment given. N. was aware of there being a mistake at the bank as to the time when the note would fall due; but to provide for its renewal in case it should be properly presented, he prepared a new note for the same amount dated 31st July, and his check for the discount, and left the same with his partner who was the notary of the bank, to obtain his father's indorsement on the note, and renew the old note if it were presented on that day. W. on the 31st July called on the notary and indorsed the new note, but nothing was done with it. B. claimed the amount from the bank on the neglect to charge the indorser, and the bank paid B., and then sued W. on the old note. W. defended the suit. Some months after, two large mortgages of W. to the bank, on distinct parcels of land, fell due, and W. desired an extension of payment. The result was an agreement, by which W. paid about one-third of N.'s note, and executed a new mortgage to the bank for the amount of the two former, payable at a future day, and embracing both parcels of land. *Held*, that the mortgage was not usurious. *id.*
3. It seems, that under the circumstances W. was liable as indorser, independent of the new agreement. *id.*
4. Foreign exchange is a commodity which is bought and sold like merchandize. The thing sold by the drawer of a foreign bill, is his money or funds abroad, or, what to the

payee is equivalent, his credit abroad, equal to cash. The bill of exchange is the instrument of transfer. *Holford v. Blatchford*, 149

5. From the nature of foreign bills, their sale by the drawer and their transfer by the payee, usually precede acceptance. And whether the contract for the sale of such a bill, be deemed an agreement to draw the bill, or one in respect of the bill already drawn; it is equally the sale of an existing thing in action, and legal. *id.*
6. Such a contract stands upon a different footing from one for the sale of promissory notes and inland bills of exchange previous to their being issued or put in circulation. Notes and inland bills are not the subject of sale, except when held by one who can maintain a suit upon them against the other parties at maturity. *id.*
7. Bankers checks and drafts, or inland bills at sight, are in this respect similar to foreign bills of exchange. *id.*
8. A bill drawn by a house in New York on a house in London, the partners in both houses being the same persons, is the legitimate subject of sale in the hands of the drawers. *id.*

See PROMISSORY NOTE.
SALE, 4 to 8.

BONA FIDE PURCHASER.

1. It is not necessary that an actual payment should be made, in order to protect a purchaser, except where there is a prior equity which is injured or affected by the legal title acquired by the purchaser. As against all subsequent equities, as well as liens, the giving of securities for the price, is a payment which gives to him the character of a purchaser in good faith. *Starr v. Strong*, 139
2. The holder of negotiable bills or notes received as security or indemnity, or as payment for a previous liability or indebtedness, without relinquishing any valid security or lien; is not protected against the true owner either in law or equity; although the same were taken in entire good faith. *Clark v. Ely*, 166
3. The New York cases on this subject, commented upon. *id.*
4. Where a surety took a confession of judg-

ment for his indemnity from the maker of two notes which he had undersigned, sold the maker's property on an execution thereon, and received the proceeds in the promissory notes of the purchasers of such property; *Held*, that he was in equity a trustee of the last mentioned notes for the holder of the obligations upon which he was surety. And that on his transferring such notes, in payment of a precedent debt of his own, or as security for such a debt, the transferee could not retain them as against the prior equity of the principal creditor, on the faith of whose debt they had been realized. The latter has the prior and superior equity, and it must prevail over the legal title. *id.*

5. This was held in the case of a bank, which discounted the trust notes, and applied the proceeds on a subsisting indebtedness, but without relinquishing any security or property. And also in respect of a judgment and execution creditor, who received such notes in payment, without notice of the trust; but who did not discharge his judgment or execution, or prove that he relinquished any lien or security in the transaction. *id.*

6. The wife of J. W. being seised of lands, joined him in executing three several mortgages to secure his bonds for money lent. Before his death, his attorney, with means furnished by him, paid the mortgagees, and took an assignment of the bonds and mortgages, to S., who soon after gave J. W. a certificate that he held them in trust for J. W. and subject to his order and control. *Held*, that J. W. was the principal debtor, and his wife's lands stood in the relation of a surety for his debt. And that after the assignment and certificate, the securities belonged to him in equity, and the lands were thereby discharged from the lien of the mortgagees.

Held also, that one who subsequently purchased the mortgages of S. in good faith and without notice, could not enforce them against the widow of J. W. and her heirs. *Fitch v. Cotheal*, 29

BOND.

1. G. asserted claims against two brothers who were partners, as well in their own right, as executors of his father's estate, and a legal controversy was likely to ensue. D., his mother, who was the assignee of two bonds given by G. to the two brothers, two years before her death attached to the bonds a writing signed by her,

expressing her desire to prevent such a controversy after her death, and directing the bonds to be cancelled on G.'s executing a discharge of all demands to his father's executors and to each of his brothers and sisters; and if he should refuse, then the bonds were to be made a set-off against any such demands, but they were never to be put in suit against him. The bonds and writing were in D.'s possession at her death, and there was no evidence of their having ever been out of her possession, or of any formal delivery of the writing by her.

Held, in a suit against her administrator, that the bonds should be delivered up to G. on his executing the discharges specified in the writing signed by D. *Brinckerhoff v. Lawrence*, 400

2. Also that the instrument could not be sustained as a *donatio mortis causa*, nor on the ground of an appointment, or as a direction to her legal representatives; but that it was rather the discharge or forgiveness of a debt. *id.*

See MORTGAGE, 12, 21 to 25; 28, 51 to 57; 63, 64.

C

CAPITAL STOCK.

See CORPORATION, 14 to 25.

CAVEAT EMPTOR.

See MORTGAGE, 21 to 25.

CESTUI QUE TRUST.

See TRUST, IV.

CHARGE.

See LEGACY, 5
MORTGAGE, 58.
WILL, 11 to 14; 37.

CHARITIES AND CHARITABLE USES.

1. Charitable uses were bestowed in England, and were recognized by law, before the Norman conquest; and they were always fostered and protected by the common law. They were subject to the jurisdiction of the

- court of chancery long before the statute of Charitable Uses, 43d Elizabeth ; and this, whether the trustees were a corporation or individuals, and whether the gift were to trustees by name, or for a definite and specific object without naming trustees. *Shotwell, Executor, &c. v. Mott*, 45
2. The English statute of Uses, 27 Henry VIII., did not apply to public uses or charities. *id.*
3. The revised statutes against perpetuities and regulating uses and trusts, were aimed at private trusts and accumulations for remote posterity. Public trusts and charitable uses were not within the intention of the legislature, or the spirit and object of the enactment. The revised statutes relative to Uses and Trusts, do not apply to Charitable Uses. *id.*
4. A bequest for the use of the poor of a town, and one to an unincorporated religious association for the use of its poor ministers, are not within the provisions of the statutes against perpetuities. *id.*
5. A bequest for the benefit of poor ministers of a specified religious denomination, is valid, though it does not appoint the trustees of the fund. And it is competent for the testator to empower the executors and trustees of his will to designate the first trustees of such fund. If it were otherwise, the trust would remain and the court of chancery would appoint the trustees. *id.*
6. A bequest for the ministers of the New York Yearly Meeting of Friends called Orthodox, who are in limited and straitened circumstances, is not too vague or uncertain, or too indefinite in its objects, and is valid. *id.*
7. So of a bequest for the relief of such indigent residents of the town of Flushing, as the trustee or trustees of the town for the time being should select. *id.*
8. Where a testator directed his executors to sell his lands and to distribute the proceeds amongst various persons together with sundry charitable institutions ; it was held that there was a conversion of the real estate and the gifts were to be treated as legacies *id.*
9. Bequests for charitable purposes to unincorporated societies, are sustained, where the object is competent, and is designated or may be clearly ascertained. *id. Hornbeck's Executor v. The American Bible Society*, 133
10. Where in bequests for such purposes, the name of the legatee is defectively described, extrinsic evidence is admissible to show what society or corporation was intended by the testator. *id.*
11. Various facts admitted in aid of construing a will and ascertaining the objects intended by the testatrix in her bequests for charitable purposes, viz. that the testatrix was a member of a society claiming the fund ; she was attached to a specified sect or denomination ; she had in her life made donations to such society ; she was a correspondent of its officers, and had taken a warm interest in its particular objects ; her deceased husband had exhibited such interest, and had made similar gifts personally and by his will ; as his executrix, she had transmitted the latter ; and that there is no other like society or institution. *id.*
12. An abbreviation of the name of the society intended, does not vitiate the legacy ; and resort may be had to a prefix applied to another society, and occurring in the same sentence, to complete the designation. *id.*
13. Where a bequest is given to a seminary or charitable institution by name, which is only a descriptive name of a particular institution or charity established and conducted by an incorporated college or society ; it is a valid legacy to such corporation to be applied in respect of the institution designated. *id.*
14. So held upon a bequest to a theological seminary, which was an institution established and conducted by the synod of the Dutch Church ; and also on bequests to the boards of missions, which were established and conducted by the same Synod. *id.*
15. On the construction of a will, legacies to the "Treasurers of the following societies, Am. Bible, Tract, Synods Board of Missions, Domestic Missions, N. Y. Colonization and Seaman's Friend ;" were held intended for The American Bible Society, The American Tract Society, The General Synod of the Reformed Protestant Dutch Church, The New York State Colonization Society, and The American Seaman's Friend Society. *id.*
16. Two Lutheran churches or religious societies, each owning temporalities, though of unequal value, entered into an agreement for a union, to remain forever as one

body, congregation or society, by a new name expressing such union; and by which their estates were to be consolidated for the common use and benefit, and the charge of their estates and concerns was intrusted to officers to be chosen out of the united congregation; with other provisions showing an entire union and consolidation into one body; and the agreement also provided that out of the property, the ancient church of one of the constituent societies should be rebuilt on the site where its ruins stood, for the use of the united congregation as soon as circumstances would admit.

The united body was immediately afterwards incorporated by the name agreed upon, and after twenty years, the corporation sold the site of the ancient church, and never rebuilt it.

In a suit brought by persons claiming to be corporators in the united church, and to be in part the representatives of the ancient congregation which owned such site, to compel the corporation to build and endow a church in pursuance of the terms of the union: *Held*, amongst other things,

1. That all the property of the two churches became vested in the incorporation.

2. That the management and control of the same vested in the trustees as a distinct body, and to the exclusion of the elders and deacons.

3. That the same vested in the corporation as an individual body or unit, in trust for the maintenance of the faith, doctrines and discipline of the Evangelical Lutheran Church; and not for the benefit of the two former congregations connected together for certain purposes. The existence of both was merged in the union. *Cammeyer v. United Lutheran Churches*, 186

17. B. having purchased a church edifice at a public sale, in his own behalf, conveyed it to an incorporated Lutheran Church, (which had another place of worship,) for a consideration equal to three-fourths of its value, on certain express conditions, of which one was that divine service therein should be in the English language. After a trial by the grantees in the maintenance of such service, which did not prosper, B. released them from all the conditions, except the one requiring it to be used as a Lutheran Church. *Held*,

1. That on the execution of the deed there were no *cestuis que trust* in existence or in expectancy; but that it created a charitable use, the fund for which flowed from B. and the corporation, as donors, and the latter were almoners of the charity.

2. That persons coming to worship in the edifice, acquired no rights, beyond the period

for which they rented pews from time to time.

3. That the conditions in the deed were vested in B. alone, and his release was competent to extinguish them.

4. That joint contributors to a charity, vesting the fund in one of their number, may revoke the charity or alter its terms and conditions. *id.*

18. A bequest to the free school of a church, the interest of which was to be appropriated by the trustees of the church for the use of the school forever, and if the school should not continue, then for the use of the church; was held to be a valid legacy. *Newcomb v. St. Peter's Church*, 636

19. Where a church claiming two legacies, as to which the executors entertained doubt, received the same from the executors, and executed to them a bond and mortgage for the amount, payable in three years; but which were given solely for their indemnity: it was held, after the lapse of twenty-six years, that the residuary legatees could not enforce the mortgage, although the church was not entitled to receive the legacies so paid by the executors. *id.*

COLLATERAL SECURITY.

See MORTGAGE, V.

COMMISSION.

1. Commission is not limited to a compensation or per centage on the receipt, payment, or transmission of money, or its equivalent. It is an allowance to a factor, broker, agent, or other person who manages the affairs of others, for his services therein; and is usually ascertained by a per centage on the value of the property sold or amount of the business done. *Stevenson v. Maxwell*, 273

2 Under a decree for an account of joint operations in real estate, the master was directed to allow no commissions. *Held*, that this excluded an allowance for superintendence and management of the joint property. *id.*

See USURY, 4 to 7.

COMMISSIONERS OF ESTIMATE AND ASSESSMENT.

See ASSESSMENTS.

COMPROMISE.

1. A doubtful claim prosecuted in good faith, is a good consideration for a promise made on compromising and settling it; and the promise cannot be impaired by showing that the claim was invalid. *Brooklyn Bank v. Waring*, 1
2. W. was the accommodation indorser of his son N., on a note to B., payable at the complainant's bank, on the 31st July. By an error of their clerk the note when left for collection, was entered as due 31st August, and was not presented for payment at its maturity, nor any notice of its non-payment given. N. was aware of there being a mistake at the bank as to the time when the note would fall due; but to provide for its renewal in case it should be properly presented, he prepared a new note for the same amount dated 31st July, and his check for the discount, and left the same with his partner who was the notary of the bank, to obtain his father's indorsement on the note, and renew the old note if it were presented on that day. W. on the 31st July called on the notary and indorsed the new note, but nothing was done with it. B. claimed the amount from the bank on the neglect to charge the indorser, and the bank paid B., and then sued W. on the old note. W. defended the suit. Some months after, two large mortgages of W. to the bank, on distinct parcels of land, fell due, and W. desired an extension of payment. The result was an agreement, by which W. paid about one-third of N.'s note, and executed a new mortgage to the bank for the amount of the two former, payable at a future day, and embracing both parcels of land. *Held*, that the mortgage was not usurious. *id.*

CONCEALMENT.

See CONFIRMATION, 3.

CONDITION.

See DEED, 3.

CONFIRMATION.

1. The executors, under a will which directed a conversion of the real estate of the testator, and a distribution of the proceeds equally among his children; made a sale which was alleged to be invalid by the heirs of one of the daughters of the testator who

survived him. Her husband having ratified the sale and received a part of the proceeds: *Held*, that her husband was entitled with her assent to receive her share of the proceeds, and that his ratification of the sale was conclusive in respect of the same. *Martin v. Sherman*, 341

2. A legatee who goes in before the master, under a decree against an executor for an account obtained by another party, or who makes the result of such accounting the basis of a suit or decree for an account in his own behalf; will be bound by the account taken in such first suit. *Newcomb v. St. Peter's Church*, 636
3. R. by his will, gave two legacies to a church, one of which was valid, and the other being specific was adeemed. He gave all his residuary property to two sisters, who resided in Ireland and who never visited this country. The executors, without fraud or collusion, in 1812 paid both legacies to the church and took from the church a bond and mortgage for their indemnity. In 1817, M. one of the sisters, filed a bill here against the executors for an account; and an account was taken by a master in 1822, pursuant to a decree. The payments to the church appeared in the executors accounts, and were allowed to them by the master. The master reported the sum due to B. the other sister, as well as to M., and the decree directed payment to them respectively; although B. was not represented in the suit. It also directed the executors to sell the real estate whenever required by B. and M., and to pay them the proceeds. M. received the amount decreed to her. In 1832 B. and her husband filed a bill here against the surviving executor for an account; which suit was continued by B's administrators; and in which a decree for an account was made; restricted to the basis of the account taken in M.'s suit in 1822. The master reported in B.'s suit, and in Feb. 1835 a decree was made in favor of her administrators, and also in favor of M.'s administrator, who had come in before the master. In 1835, B.'s administrators filed a bill to compel payment of the sum decreed to B. in M.'s suit in 1822; and the suit was settled on payment being made. In 1834, the heirs and legal representatives of B. and M. filed their bill against the surviving executor of R. praying the benefit of the decree in M.'s suit; and that he might sell the real estate and carry that decree into effect; and in 1836 a decree was made according to the prayer of the bill. During all these proceedings, the bond and mort-

gage of the church were unknown to B. and M., their representatives and legal advisers; they were not produced or mentioned in the suits; but they were not intentionally concealed or suppressed.

In a suit in 1842, by the administrators of B. and M., to have the benefit of the bond and mortgage; or to compel the church, or R.'s surviving executor, to refund the legacies; it was held, that the ignorance of M. and B. of the bond and mortgage was not material; the executors being liable to account to them irrespective of those securities. That M. was barred by the accounting in 1822. And that B by adopting it in the subsequent proceedings, was precluded from questioning its correctness. Also that B. was barred by her suit in 1832 and the decree thereon. *id.*

See MORTGAGE, 6 to 9.

CONSIDERATION.

See COMPROMISE, 1, 2.
MORTGAGE, 6 to 9; 21 to 25.

CONSTRUCTION.

See AGREEMENT, 3.
PARTNERSHIP, 1.
TRUSTS, III.
WILL, II; III.

CONTINGENT REMAINDER.

See REMAINDERS.

CONTRACT.

See AGREEMENT.
BANKING ASSOCIATIONS.

CONTRIBUTION.

See CORPORATIONS, 21 to 24.
MORTGAGE, 36, 63, 64.

CONVERSION.

See EQUITABLE CONVERSION.

CONVEYANCE.

See DEED.

COPARTNERSHIP.

See PARTNERSHIP.

COPY RIGHT.

See TRADE MARKS.

CORPORATIONS.

1. Where in a bequest for charitable uses, intended for a corporate society, the name of the legatee is defectively described, extrinsic evidence is admissible to show what society or corporation was intended by the testator. *Hornbeck's Executors v. The American Bible Society*, 133
2. An abbreviation of the name of the society intended, does not vitiate the legacy; and resort may be had to a prefix applied to another society, and occurring in the same sentence, to complete the designation. *id.*
3. Various facts admitted in aid of construing a will and ascertaining the objects intended by the testatrix in her bequests for charitable purposes, viz. that the testatrix was a member of a society claiming the fund: she was attached to a specified sect or denomination; she had in her life made donations to such society; she was a correspondent of its officers, and had taken a warm interest in its particular objects; her deceased husband had exhibited such interest, and had made similar gifts personally and by his will; as his executrix, she had transmitted the latter; and that there is no other like society or institution. *id.*
4. Where a bequest is given to a seminary or charitable institution by name, which is only a descriptive name of a particular institution or charity established and conducted by an incorporated college or society; it is a valid legacy to such corporation to be applied in respect of the institution designated. *id.*
5. So held upon a bequest to a theological seminary, which was an institution established and conducted by the synod of the Dutch Church; and also on bequests to the boards of missions, which were established and conducted by the same Synod.
On the construction of a will, legacies to the "Treasurers of the following societies, Am. Bible, Tract, Synods Board of Missions, Domestic Missions, N. Y. Colonization and Seaman's Friend;" were held intended for The American Bible Society, The Ameri-

can Tract Society, The General Synod of the Reformed Protestant Dutch Church, The New York State Colonization Society, and The American Seamen's Friend Society. *id.*

6. A right as a corporator in a religious society, is obtained by stated attendance on divine worship therein, and contributing to its support by renting a pew, or by some other mode usual in the congregation. *Camme-
yer v. United Lutheran Churches, &c.*, 186

7. Such a right cannot be derived by descent from the founders of the society, or from the former contributors to, or worshippers in the same. *id.*

8. The association between a religious incorporation and its corporators is voluntary on the part of the latter; and is dissolved by their withdrawing from attendance on its worship, omitting to contribute to its support, and uniting in the establishment of another like incorporation. *id.*

9. The *trustees* of an incorporated religious society can alone bind the corporation. The action of the *vestry* has no such force. And where the act relied upon was adopted at a meeting of the conference or council, which consisted of the minister, elders, deacons and trustees, convened in mass; the corporation was not bound, although a majority of the trustees were present. 187

10. Where the exercise of corporate acts is vested in a select body, an act done by the persons composing that body, in a mass meeting of all the corporators, or in union or amalgamated with other like bodies, parts of the corporation, is not a valid corporate act. *id.*

11. Aliens may be corporators and trustees in a religious corporation. *id.*

12. Two Lutheran churches or religious societies, each owning temporalities, though of unequal value, entered into an agreement for a union, to remain forever as one body, congregation or society, by a new name expressing such union; and by which their estates were to be consolidated for the common use and benefit, and the charge of their estates and concerns was intrusted to officers to be chosen out of the united congregation; with other provisions showing an entire union and consolidation into one body: and the agreement also provided that out of the property, the ancient church of one of the constituent societies should be

rebuilt on the site where its ruins stood, for the use of the united congregation as soon as circumstances would admit.

The united body was immediately afterwards incorporated by the name agreed upon, and after twenty years, the corporation sold the site of the ancient church, and never rebuilt it.

In a suit brought by persons claiming to be corporators in the united church, and to be in part the representatives of the ancient congregation which owned such site, to compel the corporation to build and endow a church in pursuance of the terms of the union:

Held, 1. That all the property of the two churches became vested in the incorporation.

2. That the management and control of the same vested in the *trustees* as a distinct body, and to the exclusion of the elders and deacons.

3. That the same vested in the corporation as an individual body or unit, in trust for the maintenance of the faith, doctrines and discipline of the Evangelical Lutheran Church; and not for the benefit of the two former congregations connected together for certain purposes. The existence of both was merged in the union.

4. No member of either of the former churches had any greater, better or different right in the incorporated society, than the members of the other. The rights of all were equal and upon a common footing. And if the ancient site of the one had been built upon, the rights of the members of both in such edifice would have been equal in all respects.

5. That the agreement for the union did not constitute a trust or a covenant, for the rebuilding of such edifice on the ancient site, or elsewhere. It was merely an expressed intention, which the corporation and subsequent corporators might execute or waive, in their discretion.

6. If there had been a trust, the court from the lapse of time and the circumstances, would presume that the sale of the site and other appropriation of the fund, were by the direction and with the consent of those interested. *id.*

13. B. having purchased a church edifice at a public sale, in his own behalf, conveyed it to an incorporated Lutheran Church, (which had another place of worship,) for a consideration equal to three-fourths of its value, on certain express conditions, of which one was that divine service therein should be in the English language. After a trial by the grantees in the maintenance of such service, which did not prosper, B.

- released them from all the conditions, except the one requiring it to be used as a Lutheran Church. *Held*,
1. That on the execution of the deed there were no *cestuis que trust* in existence or in expectancy; but that it created a charitable use, the fund for which flowed from B. and the corporation, as donors, and the latter were the almoners of the charity.
 2. That persons coming to worship in the edifice, acquired no rights beyond the period for which they rented pews from time to time.
 3. That the conditions in the deed were vested in B. alone, and his release was competent to extinguish them.
 4. That joint contributors to a charity, vesting the fund in one of their number, may revoke the charity or alter its terms and conditions. *id.*
 14. The remedy provided by the thirty-sixth section of the article of the revised statutes relative to "Proceedings against Corporations in Equity," is limited to creditors who have proceeded to an execution against property, without effect. *Munn, Receiver, &c. v. Pentz*, 257
 15. The thirty-ninth and fortieth sections apply to *monied incorporations* only; and as to those, give a remedy to the attorney general, or to any creditor or any stockholder, where the corporation is insolvent, or has violated its charter or any law binding upon it. *id.*
 16. The thirty-sixth section is applicable to all corporations, except the religious, library and school institutions enumerated at the close of the article. *id.*
 17. The forty-second section, and all the subsequent sections in the same article, apply to proceedings instituted under section thirty-six, as well as to those instituted under sections thirty-nine and forty. *id.*
 18. Hence, a receiver of a rail road company, appointed in a suit commenced against it under the thirty-sixth section, is clothed with all the powers and authority conferred upon receivers by the forty-second section and the several other sections which it refers to and adopts. *id.*
 19. A receiver under section thirty-six, has authority to sue for and collect all debts and demands belonging to the corporation. *id.*
 20. Under the forty-second section, such a receiver may recover sums remaining due upon any shares of stock subscribed in the corporation. *id.*
 21. This remedy is given by the statute; it may be exercised although no call has ever been made for the sums remaining unpaid on the shares; it is concurrent, and may be enforced at law or in equity; and a suit in equity for that purpose may be maintained against each stockholder severally. *id.*
 22. *Semb.* that in respect of contribution, a suit in equity may be maintained against all the delinquent shareholders jointly. *id.*
 23. A receiver prosecuting a shareholder for the unpaid balance of his stock, is not restricted in his recovery to the amount of the debt due to the creditor of the corporation who procured his appointment. He is the officer of the court, acting for all the creditors and stockholders. *id.*
 24. Nor is it an answer to his suit, that there are other shareholders who are more delinquent than the defendant in the suit; nor that such creditor is himself a delinquent stockholder. If the receiver acts oppressively in enforcing the payments due on the stock, the court will interfere either on a cross bill bringing in the favored parties, or on a summary application. *id.*
 25. A shareholder holding one hundred shares of stock, on which more than half of the nominal amount had been paid, by an arrangement with the directors, received full scrip for sixty shares, and soon after relinquished the remainder to the corporation. On the corporation subsequently passing into the hands of a receiver, it was *held*, that the creditors, and the other stockholders who did not assent, were not affected by that arrangement, and that such shareholder must make the whole hundred shares full stock, if it were necessary in order to discharge the corporate liabilities. *id.*
 26. Where the charter of a corporation permits its creditors to sue the stockholders "in any court having cognizance thereof," a suit may be commenced in equity. *Masters v. The Rossie Lead Mining Company*, 301
 27. Creditors who filed a bill against such a corporation, and thereby obtained a discovery of the names of the stockholders, then exhibited a supplemental bill against the stockholders. *Held*, that the proceeding was proper, and that creditors might

sue the corporation and the stockholders jointly in equity. *id.*

28. A creditor of a corporation may proceed against it by bill, as well as by petition, under the thirty-sixth section of the revised statutes relative to proceedings against corporations in equity. *id.*

29. The usual judgment creditor's bill, is a sufficient form of proceeding under that section; although the party filing it will not thereby obtain any preference over other creditors. *id.*

30. The charter made the stockholders jointly and severally liable for the debts of the corporation, on the return of an execution at law unsatisfied against the latter. *Held*, that creditors might enforce the liability without awaiting the issue of a decree. *id.*

31. Where in such a case several stockholders were proceeded against in equity, the decree subjected them all to the debt; with leave to apply to enforce contribution among themselves. *id.*

32. Officers of a corporation who are made parties to a bill for the purposes of discovery, are in respect of their costs deemed a part of the corporation. *Semble. id.*

33. But when the discovery thereby obtained is used to charge such officers personally in a supplementary proceeding, they will be allowed the costs of their answer. *id.*

34. An assignment, purporting to be executed by a corporation through its president and under its corporate seal, was produced, and the president's signature proved, and there appeared to be a seal attached; but there was no evidence whether the seal was that of the president or of the corporation. *Held*, that the court could not decide that point upon inspection, and that the execution of the instrument was not proved. *Mann, Receiver, &c. v. Pentz*, 257

See BANKING ASSOCIATIONS.

EXECUTORS AND ADMINISTRATORS, 1 to 8.

COSTS.

1. A defendant, who in good faith and without notice, purchased a mortgage which had been discharged in the hands of a former owner, and was foreclosing the same at law; was exempted from costs, after an unsuccessful defence to a bill, for the de-

livery up of the mortgage. *Fitch v. Cotheal*, 29

2. Where on a bill and cross bill, each party claimed more than he was entitled to, but the complainant in the original suit mainly succeeded; he was allowed his costs of that suit out of the fund, and all the other costs were directed to be borne by the respective parties who incurred them. *Craig v. Tappin*, 78

3. In a suit by the assignees of one partner against the executors of the other, for a settlement of the partnership accounts, it appeared that both parties had been in default; the accounts were intricate, the questions upon them doubtful, and though a large balance was found due, a portion of the claim equally large, was disallowed. No costs were given to either party. *Beacham v. Eckford's Executors*, 116

4. Officers of a corporation who are made parties to a bill for the purposes of discovery, are in respect of their costs deemed a part of the corporation. *Semble. Masters v. The Rosic Lead Mining Company*, 301

5. But when the discovery thereby obtained is used to charge such officers personally in a supplementary proceeding, they will be allowed the costs of their answer. *id.*

6. It appearing, in a suit to foreclose a mortgage, that there was not one hundred dollars actually due and in arrear when the bill was filed, and there being no obstacle to a sale of the premises in parcels; the bill was dismissed on that ground, with costs. *Knickerbacker v. Boutwell*, 319

7. The maturing of instalments during the pendency of the suit, so that at the hearing there was more than one hundred dollars in arrear to the complainant on the mortgage, does not aid the jurisdiction of the court, which must be determined by the state of things existing when the suit was commenced, nor relieve the complainant from costs. *id.*

8. A trustee in whom an award to a married woman had become vested for her benefit, will not be subjected to costs, although unsuccessful in maintaining her right to retain it. *Coutant v. Catlin*, 485

9. One who intentionally uses, or closely imitates another's trade marks, on merchandise or manufactures, will be subjected to the costs of a suit brought by the proprie-

tor of such trade marks for his protection.
Taylor v. Carpenter, 603

10. A commission merchant who sells the spurious article, knowing its character, is liable to a suit to restrain its further sale by the proprietor of the trade mark, and will be subjected to the costs of such suit.
Coats v. Holbrook, 586

COVENANT.

See AGREEMENT, 3.
DEED, 4 to 6.
POWERS, 1, 2.
SPECIFIC PERFORMANCE, 6, 7.

CREDITOR'S SUIT.

See DEBTOR AND CREDITOR, II.

CROSS BILL.

See COSTS, 2.

D

DAMAGES.

See STOCKS.
TRADE MARKS, 2, 8.

DEBTOR AND CREDITOR.

- I. *Of Trusts and Assignments for the benefit of Creditors; and herein of conveyances and transfers fraudulent as against creditors.*
- II. *Of suits by judgment creditors; and of the effect thereon of proceedings in bankruptcy.*
- III. *Of suits by receivers of corporations, and by and in behalf of creditors of corporations.*
- IV. *Of claims against the separate estate of married women, and in their behalf, by virtue of marriage settlements; and of partnership debts.*

DEBTOR AND CREDITOR, I.

Of Trusts and Assignments for the benefit of Creditors; and herein of conveyances and transfers fraudulent as against creditors.

1. Where a father, whose debts both as prin-

cipal and surety were less than his property, and who had no expectation of being charged with the debts for which he was surety, conveyed his farm to his son, and for the price received a note and mortgage on the farm for its full value, payable in twenty-six equal annual instalments; *Held*, that the circumstances did not establish a fraud as against the creditors of the father.
Starr v. Strong, 139

2. A general assignment executed by an insolvent debtor, to his brother who at the time was unfit to attend to business by reason of a lingering disease, which the assignor believed was incurable and of which he died; was held for that cause to be fraudulent and void as against creditors. *Currie v. Hart*, 353

3. The selection of such an assignee furnishes strong presumption of an intent on the part of the assignor to keep the control and disposal of the property. *id.*

4. The assigned property was almost wholly fees earned in the office of sheriff. The assignor's deputy continued to receive and collect the same after the assignment, and to dispose of them as he had done previously, except that he paid over to the assignor only upon the assignee's direction. This was held to be evidence of fraud in the assignment. *id.*

5. So of an understanding that the assignee should allow to the assignor a weekly sum for his services, the same being nominal. *id.*

6. An assignment by a sheriff of fees due and to become due, having for one of its objects an indemnity of his sureties against future misappropriation of monies which should be collected on executions, is void. *id.*

7. Whether an assignment of future fees by a sheriff, for the benefit of creditors would be valid? *Quære. id.*

8. Where a mortgage given upon leaseholds and household furniture, for securing liabilities incurred for the mortgagor's accommodation, was not filed pursuant to the act of 1833, till seven months after it was given, was never renewed according to that act, and there never was any change in the possession of the furniture; it was *held*, that the entire mortgage was fraudulent and void as against creditors, although as to the leaseholds there was a change of possession. *Goodhue v. Berrien*, 630

9. The case of *Darling v. Rogers*, (22 Wend.

- 483,) commented upon. It does not sustain an assignment in part, where there is a corrupt intent apparent as to some other part of the instrument or of the property therein contained; but holds that if it contain a trust unauthorized by law, inserted without any corrupt motive, such trust is not evidence of fraud, and therefore does not avoid the other portions of the instrument. *id.*
10. Neither a *bona fide* debt nor an actual advance of money, will sustain a security infected with fraud. *id.*
11. Where a resident of another state, owning lands here, conveyed them to a trustee residing here, in trust to sell the same, and out of the proceeds, after paying certain specific sums, to remit the balance to a person residing at the grantor's domicile, to be by him applied rateably upon all the debts of the grantor; and the grantor died insolvent, owing debts at his domicile and in other more distant states, and leaving executors who qualified at his domicile; it was *held*, that any of his creditors might file a bill in this state, in behalf of themselves and all other creditors, against the trustee, the distributor of the fund, and the executors of the grantor; to have the lands sold, the accounts of the trustee taken, and the fund distributed to the creditors. *Slatter v Carroll*, 573
12. The trust fund being real estate situated here, and the trustee a resident of this state, the jurisdiction of our court of chancery is unquestionable. *id.*
13. And where there are real assets, the court will not hesitate to administer them, although no personal representative has been appointed here. *id.*
14. It is no objection to entertaining the jurisdiction, that the creditor instituting the suit, resides at the place of the grantor's domicile. *id.*
15. The rule of distribution, must be that of the trust deed, when it is not repugnant to the laws of this state. *id.*
16. The court will direct the fund to be remitted, pursuant to the deed of trust, to the person therein designated, for distribution; or will retain it and distribute it here, according to the circumstances of the case, in reference to the convenience of creditors and of the accounting parties. *id.*
- See Post, 27, 28.
- DEBTOR AND CREDITOR, II.
- Of suits by judgment creditors, and of the effect thereon of proceedings in bankruptcy.*
17. The commencement of a suit in chancery by a judgment creditor, whose execution at law has been returned unsatisfied, gives to him an equitable lien upon the things in action of the judgment debtor. *Storm v. Waddell; De Kay v. Waddell*, 494
18. Such was the law of this state before the revised statutes went into operation. *id.*
19. The adjudged cases, bearing upon this point, cited and examined. *id.*
20. The lien acquired by the creditor, is defeasible only by a discharge of the debt, or by a successful defence of the suit in some one of the very restricted modes open to the defendant. *id.*
21. The debtor cannot set up in such a suit, any defence to the original demand, on which the judgment was recovered; nor any irregularity in its entry or in the execution; nor that the sheriff refused to levy on property, unless the creditor colluded with him in his misconduct. *id.*
22. On an order being made for the appointment of a receiver in a judgment creditor's suit, and upon the appointment being completed, the property subject to the order vests in such receiver in equity, as of the date of the order, without the execution of any transfer or assignment. *id.*
23. In regard to movable property liable to execution at law, although it is subject to the lien of the creditor, it may be seized on execution by any other creditor, until the order for a receiver is made, but not afterwards; such order being equivalent to an actual levy on the property. *id.*
24. A discharge of the debtor, in bankruptcy or insolvency, from his debts, pending the suit, does not operate to discharge or impair the lien acquired by the commencement of such a suit. The suit may proceed *in rem* although the person and the future assets of the debtor may in the mean time be exonerated. *id.*
25. Where a debtor was declared a bankrupt under the act of congress of 1841, upon a petition filed after the commencement of a judgment creditor's suit against him in the court of chancery; it was *held*, irrespective of the proviso in the second section of the

- bankrupt act, that the assignee in bankruptcy took the debtor's things in action, subject to the creditor's lien acquired by the suit. *id.*
26. *Held* further, that the right of the judgment creditor in these cases, constituted a lien or security, within the meaning of the proviso in the second section of the act, and is protected thereby. *id.*
27. An assignee in bankruptcy may avoid an assignment executed by the bankrupt in fraud of his creditors, before the passage of the bankrupt law; but if a judgment creditor files a bill to set aside the assignment, before the proceedings in bankruptcy are instituted, and duly prosecutes his suit; he thereby acquires a lien which cannot be divested or impaired by the assignee in bankruptcy. *id.*
28. This was held in a case where the bill was filed, the subpoena to answer served, and the order for a receiver made, before the petition in bankruptcy was presented to the U. S. District Court; although no receiver was appointed until after the debtor was decreed to be a bankrupt. *id.*
29. After a debtor had been decreed a bankrupt and before he was finally discharged, a judgment creditor's suit was commenced against him, and the creditor claimed to have discovered a piano, which he was entitled to have applied towards his debt. The answer set up the bankrupt proceedings and the debtor's discharge. *Held*, that if the piano were acquired by the debtor prior to his bankrupt proceedings, it became vested in his assignee by force of the decree; and if it were acquired subsequently, the discharge was a bar to the creditor's claim in respect of his judgment. *id.*
30. Where in a judgment creditor's suit, the defendant put in issue the return of the execution issued out of the supreme court against his property, and the complainant produced at the hearing an execution with a proper return indorsed, which had been filed *nunc pro tunc*, as of a day prior to the commencement of the suit, pursuant to a rule of that court made on a motion without notice after the issue was joined in the creditor's suit, on the ground that the original execution had been lost on its transmission from the sheriff to the clerk; it was *held*, that the evidence sustained the issue on the part of the complainant. *Bradford v Reed*, 163
31. The circumstance of its being relied on as a defence to the creditor's suit, would be no answer to such a motion in the supreme court, and ought not to interfere with the force of the rule thereupon granted. *id.*

DEBTOR AND CREDITOR, III.

Of suits by receivers of corporations, and by and in behalf of creditors of corporations.

See BANKING ASSOCIATIONS, 3. 4.
CORPORATIONS, 14 to 33.

DEBTOR AND CREDITOR, IV.

Of claims against the separate estate of married women, and in their behalf by virtue of marriage settlements; and of partnership debts.

32. A general debt incurred by a married woman is not a charge upon her separate estate, nor is such estate chargeable upon any implied undertaking of hers. *Curtis v. Engel*, 287

33. To make the separate estate of a married woman liable for her debt, where it is not charged upon the estate pursuant to the deed of settlement, it must be shown that the debt was contracted either for the benefit of her separate estate, or for her own benefit upon the credit of the same. *id.*

34. A milliner on the eve of her marriage, transferred her furniture, stock in trade and things in action to a trustee for her sole and separate use, without providing for conducting the business in future. After her marriage, the stock was disposed of, and she went to Europe. It was after an interval, resumed by her, in her own name, her husband aiding in its management, but the trustee having no concern with it. *Held*, that the business was not conducted for the benefit of her separate estate, and the latter was not chargeable with the debts contracted therein. The business was in point of law the husband's, and the profits belonged to him.

And upon the evidence, it was held that the goods furnished to her and her husband in the millinery business, were not sold upon the credit of her separate estate. *id.*

35. By a marriage contract executed in France by parties domiciled there, on the eve of their marriage, the wife under the

provisions of the French law, put one-third of her fortune into *community*, and excluded the residue therefrom, which residue was to belong to her and be re-taken by her. The parties removed to New York, and the husband died there twenty years afterwards. He had taken and used in his business, the whole residue of his wife's property, as well as that of the community. At his death, he was in equity seised of and entitled to real estate in New York.

On a bill filed by his widow, claiming that the marriage settlement operated as a *mortgage* on his whole estate, and that she was entitled to priority of payment of all her demands arising under the settlement,

- Held*, 1. That according to the laws of France, if the parties had remained there, she would have had no preference over other creditors of the husband in respect of his movables, nor any lien by way of *privilege* over his immovables. She would have had a *mortgage* upon his immovables.
2. That although the courts here, construing the settlement according to the *lex loci contractus*, will give to her the same rights as a creditor, that the French law would confer; they cannot and ought not to yield to her over real estate situated here, a lien or priority unknown and repugnant to the laws and regulations of the country *rei sitæ*.
3. Creditors here are entitled to rely upon those laws for the administration of their debtor's estates.
4. The French Civil Code refuses to contracts made in a foreign country, the force of a mortgage in France; and international comity does not require us to pursue a different course.
5. That therefore the complainant, whatever was the extent of her rights as a creditor by reason of the contract of marriage, had no lien upon her husband's estate, nor priority over his other creditors. *Ordronaux v. Rey*, 33

36. As it respects the partners and their creditors, real estate belonging to a partnership, is in equity subjected to the same general rules as personal property. *Delmonico v. Guillaume*, 366

37. Where real estate was purchased by two partners, with the funds and for the business of the copartnership, and one of them died leaving the firm without personal property sufficient to pay its debts; it was held that the real estate was in equity to be treated as personal property, and the surviving partner had an absolute right to dispose of it as such, for the payment of the debts of the firm. *id.*

38. A creditor of a copartnership cannot proceed in equity against the estate of a deceased partner, without showing that he has exhausted his remedy at law against the surviving partners; or that a resort to legal process against them would be unavailing. *Slatter v. Carroll*, 573

39. This may be established by proof that the survivors are insolvent and have no visible property or assets liable to execution. *id.*

See DONATION.

MORTGAGE, 39 to 41.

DECREE.

1. After a decree has been made by the chancellor, it is not competent for any vice-chancellor to make any order or decree which would directly or indirectly discharge, alter or modify the same. *The Greenwich Bank v. Loomis*, 70
2. Held accordingly, where after a decree of foreclosure and sale obtained by default in a mortgage suit before the chancellor; a purchaser, *pendente lite*, of the lands mortgaged, filed a bill before a vice-chancellor, praying for an adjudication that the mortgage never was a lien, or if it were that it belonged to such purchaser, and that the defendant in such suit from whom he bought, had a claim to the lands prior to the mortgage. *id.*
3. A bill of review can only be filed after enrolment, and then only for error apparent on the decree, or to produce relevant matter existing at the time of the decree but discovered afterwards. A bill in the nature of a bill of review, may be exhibited after the decree is entered, and before enrolment. *id.*
4. A purchaser *pendente lite*, will be bound by a decree in the suit, and the complainant need not make him a party, or otherwise notice his purchase. If he desires to defend the suit, he must make himself a party to it by a supplemental bill, before it terminates. *id.*
5. An original bill cannot be filed by such a purchaser, after a decree in the suit pending, to litigate anew or question the subject matter of such suit. *id.*
6. Chancery will not compel a purchaser in good faith under its decree, to take a defective title, where the defect is brought to its notice; but it does not undertake that none

but good titles shall be sold under its directions. *Williamson v. Field*, 533

7. An order upon a purchaser under a decree of foreclosure to complete the sale, made on a specific objection taken to the title; does not decide a question of title or of parties, which was not made the ground of objection, or brought to the consideration of the court. And such order is not a protection to the purchaser, against persons having vested interests in the equity of redemption; who ought to have been, but were not, made parties to the foreclosure. *id.*

8. Under an order of the court of chancery, authorizing a trustee to execute mortgages on lands, in which he has a life estate, and his children an estate in fee, to secure monies already advanced to him and debts owing by him, as also monies to be advanced or lent to him; and authorizing him, amongst other things, to apply the monies to the payment of his debts, and invest the surplus so as to yield an income for the support of his family; it was held, that he could not execute a mortgage for clothing thereafter to be furnished for himself or his children, nor upon a verbal or written agreement to advance money at a future day. *id.*

DEED.

1. A married woman seized of land in her own right, executed a deed in her maiden name, dated prior to the marriage, which was proved by a subscribing witness and then recorded. The deed was set aside as invalid, both because it was not acknowledged by her in the form prescribed by law, and because her husband did not join in it, or execute a concurrent conveyance. *Galliano v. Lane*, 147

2. On setting aside a deed, the guardian *ad litem* of an infant defendant, in whom the invalid title in part rested, was directed to join in a re-conveyance, executing it for and in the name of the infant. *id.*

3. B. having purchased a church edifice at a public sale, in his own behalf, conveyed it to an incorporated Lutheran Church, (which had another place of worship,) for a consideration equal to three-fourths of its value, on certain express conditions, of which one was that divine service therein should be in the English language. After a trial by the grantees in the maintenance of such service, which did not prosper, B. re-

leased them from all the conditions, except the one requiring it to be used as a Lutheran Church, *Held*,

1. That on the execution of the deed, there were no *cestuis que trust* in existence or expectancy; but that it created a charitable use, the fund for which flowed from B. and the corporation, as donors, and the latter were the almoners of the charity.
2. That persons coming to worship in the edifice, acquired no rights, beyond the period for which they rented pews from time to time.
3. That the conditions in the deed were vested in B alone, and his release was competent to extinguish them.
4. That joint contributors to a charity, vesting the fund in one of their number, may revoke the charity or alter its terms and conditions. *Cammeyer v. United Lutheran Churches*, 186

4. Where land is conveyed subject to a mortgage for which the grantor is personally liable, and the deed declares that the grantee is to pay the mortgage as a part of his purchase money; he is liable to the grantor for the amount of the mortgage, as the same becomes due, in an action of assumpsit. *Rawson's Administratrix v. Copland*, 251

5. If the grantee executes the deed, he will be liable therefor in an action of covenant. *id.*

6. The contract made by the assumption in the deed, is not one of indemnity merely. It is a contract to pay; and the grantor in the deed may enforce it without actual payment made by him. *id.*

7. Where one purchases land which is subject to a bond and mortgage, executed by his grantor, and in his deed assumes and agrees to pay the mortgage; he is liable to his grantor to pay the same as a part of the price or consideration of the land. *Blyer v. Monkolland*, 478

8. As between him and the mortgagor, the latter thereupon becomes a surety for the former, in respect of the mortgage debt. *id.*

9. An assignment, purporting to be executed by a corporation through its president and under its corporate seal, was produced, and the president's signature proved, and there appeared to be a seal attached; but there was no evidence whether the seal was that of the president or of the corporation.

Held, that the court could not decide that

point upon inspection, and that the execution of the instrument was not proved. *Mann, Receiver, &c. v. Pentz*, 257

10. Where the witness sworn by a commissioner of deeds, to identify the grantor in a conveyance, on the latter's appearing to acknowledge the execution of such conveyance, is the grantee therein, or otherwise interested in sustaining its execution; the certificate of the officer of its due acknowledgment, furnishes no proof of its execution. *Goodhue v. Berrien*, 630

11. A subscribing witness testified to his own signature to a mortgage, and that it was signed and acknowledged by a person who was introduced to him as the mortgagor. Another witness identified the signature thus made, as that of the mortgagor. *Held*, that the mortgage was sufficiently proved. *id.*

12. A mortgage, attested by a witness who was previously unacquainted with the grantor, is not an unattested conveyance within the meaning of 1 R. S. 738, § 137. *id.*

13. An averment of the execution of a deed or writing, imports delivery, as well as signing. *Brinckerhoff v. Lawrence*, 400

See DONATION.
DOWER.
POWERS.
SPECIFIC PERFORMANCE, 6, 7.
TRUST, 20.

DEFICIENCY.

See DEED, 5 to 8.

DELIVERY.

See DONATION.

DEMAND.

See EXECUTORS AND ADMINISTRATORS, 9, 10.

DEPOSIT OF DEEDS.

See EQUITABLE MORTGAGE.

DEVISE.

See WILL.

DISCOVERY.

See COSTS, 4, 5.

DISCHARGE.

See BANKRUPT, 9 to 12.
MORTGAGE, VIII.

DISSOLUTION.

See PARTNERSHIP.

DONATIO MORTIS CAUSA.

See DONATION, 2.

DONATION.

1. G. asserted claims against two brothers who were partners, as well in their own right, as executors of his father's estate, and a legal controversy was likely to ensue. D., his mother, who was the assignee of two bonds given by G. to the two brothers, two years before her death attached to the bonds a writing signed by her, expressing her desire to prevent such a controversy after her death, and directing the bonds to be cancelled on G.'s executing a discharge of all demands to his father's executors and to each of his brothers and sisters; and if he should refuse, then the bonds were to be made a set-off against any such demands, but they were never to be put in suit against him. The bonds and writing were in D.'s possession at her death, and there was no evidence of their having ever been out of her possession, or of any formal delivery of the writing by her.

Held, in a suit against her administrator, that the bond should be delivered up to G. on his executing the discharges specified in the writing signed by D. *Brinckerhoff v. Lawrence*, 400

2. Also that the instrument could not be sustained as a *donatio mortis causa*, nor on the ground of an appointment, or as a direction to her legal representatives; but that it was rather the discharge or forgiveness of a debt. *id.*

3. It seems there is a distinction between donations unaccompanied by delivery, where the object is to forgive a debt; and those in which the donor's apparent intent is to transfer property, either in his possession or by means of his own note or bond. *id.*

4. The strong expressions in the books of the common law, against sustaining donations, either *mortis causa* or *inter vivos*, without tradition or actual delivery, are owing to such gifts being usually claimed on parol evidence. *id.*
5. Where the intent of the donor is proved under his own hand, a delivery will be presumed from slight circumstances. *id.*
6. The retention of the deed or instrument by the donor does not impair its validity, unless there be clear and decisive proof that he never parted or intended to part with its possession. *id.*
7. Though courts of justice ought never to strain a point of law to relieve a case of hardship, or to support a claim however meritorious: equity should strive to validate an instrument, evidently designed to be made effectual by the party, which proceeded not merely on a good consideration, but on that of settling and avoiding family broils; if the principles of law, or the force of judicial decisions will sanction a decree in its support. *id.*

DOWER.

W. being seised of lands subject to a mortgage, which had not been executed by his wife, conveyed them to D., his wife joining with him in due form. D. subsequently reconveyed them to W. *Held*, that the wife's inchoate right of dower was extinguished by the deed to D. and was not restored as against the mortgage by the reconveyance; and that she was dowable of the equity of redemption only. *Heogland v. Watt*, 148

E

EQUITABLE CONVERSION.

Where a testator directs his executors, after paying legacies, to sell his real estate to the best advantage in their power, and as sound discretion might direct, and then to divide the whole proceeds equally among his children; there is an equitable conversion of the land; the quality of personalty is given to its proceeds to all intents; and it is to be considered in equity as personal property for all the purposes of the will. *Martin v. Sherman*, 341

See PARTNERSHIP, 10, 11, 14.
WILL, 18.

EQUITABLE MORTGAGE.

1. In the absence of other proof, evidence of an advance of money, and the finding of title deeds of the borrower in the possession of the lender, establishes an equitable mortgage. *Rockwell v. Hobby*, 9
2. E. advanced money to one who held a bond and mortgage against his mother, H., paying its full amount. There was no assignment executed, the securities were lost, and it did not appear that they ever left the possession of their mutual attorney; but E. had the possession of H.'s deed for the premises mortgaged, and retained it till his death. It did not appear how he came by the deed. *Held*, that the son had an equitable lien on the premises for the amount of his advance with interest. *id.*
3. If there had been no deposit of the deed, but he advanced the money on an agreement to have the mortgage assigned, equity would substitute him in the place of the mortgagee. *id.*

EQUITY.

Though courts of justice ought never to strain a point of law to relieve a case of hardship, or to support a claim however meritorious; equity should strive to validate an instrument, evidently designed to be made effectual by the party, which proceeded not merely on a good consideration, but on that of settling and avoiding family broils; if the principles of law, or the force of judicial decisions will sanction a decree in its support. *Brinckerhoff v. Lawrence*. 400

EQUITY, PRIOR.

See PRINCIPAL AND SURETY, 1 to 6.

EQUITY OF REDEMPTION.

See MORTGAGE.

ESTATE.

See REMAINDERS.
TRUSTS.

ESTOPPEL

See CONFIRMATION, 1 to 3.

EVANGELICAL LUTHERAN CHURCH.

See AGREEMENT, 3.
CHARITABLE USES, 17.

EVICTION.

1. An eviction is established by proof that at the time of the purchase, the lands sold were actually occupied under a valid hostile title, so that the purchaser could not obtain possession of the same, and whereby he never did obtain actual possession. *Withers v. Codwise*, 350
2. Where the title to real estate fails, the purchaser has no remedy in equity to recover back the price, unless there was fraud or deceit in the sale. *Banks v. Walker*, 344
3. The only recognized ground of equitable interference to stay the collection of the unpaid purchase money, in the absence of fraud, is a failure of the consideration by reason of a defect of title clearly established, and an eviction from the possession of the land. *id.*
4. These facts may be shown as a defence, when the collection is attempted in chancery, notwithstanding the deed contains covenants of title. *id.*
5. In a suit for the foreclosure of a mortgage, the defendant set up that the mortgage was given for the purchase money, that the lands were conveyed to him without covenants, and that one claiming a paramount title had commenced an ejectment for the recovery of the lands, which was in vigorous prosecution, and if successful, would divest all the mortgagor's title except a dower right. The defendant entered into the possession of the lands at the time of his purchase, and had not been turned out or evicted. The defence was overruled, and a decree made for the sale of the lands, and against the mortgagor for the deficiency, in case the proceeds of the sale were insufficient to pay his bond accompanying the mortgage. *id.*

EVIDENCE.

1. The *defendant*, in a suit for specific performance, may show in his defence, by parol evidence, that the written contract relied upon, does not correctly and truly express the agreement of the parties, but that there is some material omission, insertion or variation, through mistake, surprise or fraud. *Best v. Stow*, 297

2. Where an agent purchases land in his own name at the request and for the benefit of his principal, and gives his own bond and mortgage for the purchase money in which the principal joins ostensibly as surety, it is competent to prove by parol evidence that the latter is the principal in the transaction and the agent the surety. *The Mohawk and Hudson Rail Road Company v. Costigan*, 306

3. Where the witness sworn by a commissioner of deeds, to identify the grantor in a conveyance, on the latter's appearing to acknowledge the execution of such conveyance, is the grantee therein, or otherwise interested in sustaining its execution; the certificate of the officer of its due acknowledgment, furnishes no proof of its execution. *Goodhue v. Berrien*, 630
4. A subscribing witness testified to his own signature to a mortgage, and that it was signed and acknowledged by a person who was introduced to him as the mortgagor. Another witness identified the signature thus made, as that of the mortgagor. *Held*, that the mortgage was sufficiently proved. *id.*

See DEBTOR AND CREDITOR, 30.
DEED, 9, 13.
DONATION, 5, 6.
PLEADING, 17 to 19, 23 to 25.
USURY, 1 to 3, 7.
WILL, II.

EXCHANGE.

See SALE, 4 to 8.

EXECUTED AGREEMENT.

See SPECIFIC PERFORMANCE, 6, 7.

EXECUTION.

See JUDGMENT AND EXECUTION.

EXECUTORS AND ADMINISTRATORS.

1. A decree against the primary administrators of an intestate, in a suit relative to the succession of movable property, conducted in

due form and between proper parties, at the place of his domicile in a foreign country ; is conclusive upon a subsidiary administrator appointed here, in respect of the rights of the parties which were therein adjudicated. *Suarez v. The Mayor, &c. of New York*, 173

2. This was held of a decree in the Superior Court of Justice for the District of Carthage in the republic of New Grenada, establishing the right of a party as next of kin of an intestate ; the question arising in a suit by such party to recover assets obtained by an administrator appointed here. *id.*
3. Where the principal administrator at an intestate's domicile, in a foreign country, allots to a party as his next of kin, divers things in action existing here, and makes a transfer and delivery of the same so far as is practicable ; such party is entitled to receive the things in action from the administrator here, in the absence of creditors claiming the fund. *id.*
4. On such an administration here, it appearing that the claimant would be entitled at the domicile of the intestate, to receive the entire fund, all other claimants having been ascertained and paid by the principal administrator there ; the fund will be paid directly to such claimant, without remitting it to the intestate's domicile. *id.*
5. The statute exemption from the payment of interest on moneys paid into the treasury of the city of New York by the public administrator, was designed as a compensation for the important public duty of rescuing the effects of aliens and strangers, and preserving them for their creditors and relatives. And it was intended by the legislature that the corporation of the city should have the benefit of the use of the money until it should be claimed by the rightful owners. *id.*
6. The corporation does not stand upon the footing of private trustees, using the trust fund for their own profit or advantage, and is not liable to pay interest on those moneys, unless by reason of some wrongful act or omission. *id.*
7. And before paying the fund to a foreign claimant, regard to the public duty as well as the pecuniary liability of the corporation, requires that his right should be very fully established. *id.*
8. The common council is a legislative body, charged with interests and duties of great magnitude and importance ; and its action in respect of claims, is necessarily more like

that of a legislature, than like an individual's. Therefore the corporation of the city is not put in default as to the payment of the fund in such a case, by a petition to the common council truly exhibiting a rightful claim, where no proof is presented with it. It is the claimant's duty to follow up his petition, and exhibit his proofs to the common council, or to the committees intrusted with its examination. *id.*

9. Where land is conveyed subject to a mortgage for which the grantor is personally liable, and the deed declares that the grantee is to pay the mortgage as a part of his purchase money ; he is liable to the grantor for the amount of the mortgage, *as the same becomes due*, in an action of *assumpsit*. The contract made by the assumption in the deed, is not one of indemnity merely. It is a contract to pay ; and the grantor in the deed may enforce it without actual payment made by him ; and the liability of the grantee by force of such an assumption, is a *demand* against him, which in the event of his death, may be set off in favor of the grantor, in a suit brought by the legal representatives of the grantee upon a contract for the payment of money. *Rawson's Administratrix v. Copland*, 251
10. B. bought four lots of ground, and executed mortgages thereon to P. for the purchase money. Then B. sold and conveyed the lots to C. subject to the mortgages, which the latter by the deed, was to pay as a part of the price. C. sold and conveyed the lots to R. in the same manner. After R.'s death, the mortgages were foreclosed, the lots were sold, and there was a large deficiency in satisfying the mortgage debt, which B. paid to P. B then demanded the same of C., who paid him by his own bond and a mortgage on land. In a suit by R.'s administratrix to foreclose a bond and mortgage given by C. to R., it was held that the amount of the deficiency was a demand existing against R. in his lifetime, which C. might set off against the bond and mortgage sought to be foreclosed. Also held that the costs paid by C. to B. were not within the contract of R., and could not be set off. *id.*
11. The principle of the rule, that where a person becomes a surety in a note to be used for a particular object, the principal cannot divert it from that object without the surety's assent ; applied as between the principal's administrator and the surety, in favor of the latter, to the proceeds of such a note remaining in the principal's hand at his death. *Lee v. Highland Bank*, 311

12. The administrator's claim to retain the proceeds is no better than that of the intestate would have been if he had been living. *id.*

See CONFIRMATION, 3.
DEBTOR AND CREDITOR, 11 to 16; 38, 39.
DONATION.
JURISDICTION, 6 to 12.
WILL, 15 to 17.

EXPECTANT ESTATE.

See REMAINDERS.

EXTINGUISHMENT.

See MORTGAGE, VIII.

EXTRINSIC EVIDENCE.

See WILL, II.

F

FAILURE OF TITLE.

See DECREE, 6 to 8.
MORTGAGE, 21 to 25.

FIDUCIARY.

See TRUSTS, IV.

FIXTURES.

As between mortgagor and mortgagee, fixtures put up for manufacturing, on property leased for years, are included in and pass by a mortgage of the land. *Day v. Perkins*, 359

FORECLOSURE.

See MORTGAGE, IX.

FOREIGNERS.

See CORPORATIONS, 11.
TRADE MARKS, 6, 7.

FOREIGN EXCHANGE.

See SALE, 4 to 8.

FOREIGN LAW.

See EXECUTORS AND ADMINISTRATORS, 1 to 4.
MARRIAGE SETTLEMENT, 1.

FRAUD.

See CONFIRMATION, 3.
DEBTOR AND CREDITOR, I.
FRAUDS, STATUTE OF.
MORTGAGE, 1.

FRAUDS, STATUTE OF.

1. Where the defence to a contract stated in a bill, is that it was not in writing, the answer must set up such defence as a fact, and put it in issue distinctly. When the answer admits the making of the agreement alleged in the bill, without asserting that it is not in writing and that it is therefore void by the statute of frauds, the defendant cannot object to the contract on that ground at the hearing. *Vaupell v. Woodward*, 143
2. Stating in the answer that the contract is void in law and that the defendant is not bound to perform the same, is not sufficient to enable him to avail himself of the statute of frauds, or to put the complainant on proof of a contract in writing. *id.*
3. Railway shares not within the English statute of frauds against parol contracts—*in note.* *id.*
4. Since the revised statutes, contracts for the sale of lands resting upon mutual promises, must be subscribed by both the buyer and the seller, to be obligatory upon the latter. *Cammeyer v. The United Lutheran Churches*, 186
5. Although an agreement which may be performed within a year, is not within the clause of the statute of frauds respecting contracts not to be performed within that period; an agreement which cannot be performed within a year, except upon a contingency, which the parties could not hasten or retard, as the death of some person, is not within the statute. And the possibility of performance which withdraws a case from the force of the statute, must rest upon human effort or volition, and not upon providential interference. *Semble. Tolley v. Greene*, 91

See EVIDENCE, 1.

FREE BANKS.

See BANKING ASSOCIATIONS.

FRENCH LAW OF SETTLEMENTS.

See MARRIAGE SETTLEMENT, 1.

FUTURE ADVANCES.

See MORTGAGE, II.

FUTURE ESTATES.

See REMAINDERS.

G

GENERAL BANKING LAW.

See BANKING ASSOCIATIONS.

GOOD WILL.

See TRADE MARKS, 1, 8, 9, 11, 13.

GUARDIAN AD LITEM.

See DEED, 2.

H

HUSBAND AND WIFE.

1. A married woman seized of land in her own right, executed a deed in her maiden name, dated prior to the marriage, which was proved by a subscribing witness and then recorded. The deed was set aside as invalid, both because it was not acknowledged by her in the form prescribed by law, and because her husband did not join in it, or execute a concurrent conveyance. *Galilano v. Lane*, 147

2. Where a husband gave to his wife by will, in lieu of dower, a decent and comfortable support and maintenance out of his estate in sickness and in health during her lifetime, leaving the residue of his property to his two children, it was held that such allowance was not to be measured by the sum requisite to support her in a boarding house; but that she should have sufficient to maintain her in house-keeping at

the place of her residence, and in the manner to which she had been accustomed while living with her husband; it appearing that the sum necessary for such a maintenance was less than the interest on one-third of the testator's estate. *Tolley v. Greene*, 91

3. W. being seised of lands subject to a mortgage, which had not been executed by his wife, conveyed them to D., his wife joining with him in due form. D. subsequently reconveyed them to W. *Held*, that the wife's inchoate right of dower was extinguished by the deed to D. and was not restored as against the mortgage by the reconveyance; and that she was dowable of the equity of redemption only. *Hoogland v. Watt*, 148

4. Where a testator directed his executors to sell his real estate to the best advantage in their power and as sound discretion might direct, and to divide the proceeds among his children equally; and the executors made a sale which was alleged to be invalid by the heirs of one of the daughters of the testator who survived him. Her husband having ratified the sale and received a part of the proceeds; *Held*, that there was an equitable conversion of the land, and that her husband was entitled with her assent to receive her share of the proceeds, and that his ratification of the sale was conclusive in respect of the same. *Martin v. Sherman*, 341

See MARRIAGE SETTLEMENT.
MORTGAGE, 29.

I

ILLEGAL OR VOID.

See BANKING ASSOCIATIONS.
DEBTOR AND CREDITOR, I.

INDEMNITY.

See EXECUTORS AND ADMINISTRATORS, 9, 10

INFANT.

See DEED, 2.

INJUNCTION.

See JURISDICTION, 15.
TRADE MARKS, 2, 8, 15, 19.

INSOLVENT.

See BANKRUPT.

INTEREST.

1. There is no general rule fixing the date of the dissolution of a partnership as the period from which interest is to be computed against the partner who is indebted to his associate. *Beacham v. Eckford's Executors*, 116
2. The allowance or refusal of interest in such cases, depends upon the circumstances of each. *id.*
3. E. in New York and B. in Baltimore, were partners in building a frigate in Baltimore, and subsequently in conducting a ship-yard there. E. made the advances on building the frigate and received the price; and in 1827, three years before the dissolution, was aware in general terms that in a settlement of their accounts there would be a large balance due to B. but he did not know what such balance was. There never was any settlement made between the partners. The accounts were kept at Baltimore, and there were extensive transactions afterwards, so that at the dissolution, in 1830. though E. might have well inferred that he owed B., he had no means of ascertaining what was the true balance. E. in 1827, applied to B. for an account, which B. promised to send from time to time, but it was never sent. And E. neglected to furnish his accounts to B. when requested. E. died in 1832, and there was no accurate statement of the accounts made out until 1837, after a suit was commenced by B.'s assignees against E.'s executors, for a settlement. Such statement was then made known to the executors; and it thereby appeared that there was a balance of more than \$27,000 due from E. to B. in 1830. *Held*, that both parties had been remiss in their duty; that B. should have furnished his accounts so as to put E. in default; that E.'s executors should not be charged with interest from the date of the dissolution on the balance afterwards found to have been then due from E.; but that they were liable to pay interest from 1837, the date when they were authentically informed of the extent of such balance, because although the suit was then in progress, they might have paid the ascertained amount into court for the benefit of B.'s assignees. *id.*
4. Upon the death of a copartner it is the duty of the survivor to furnish to the representatives of the deceased partner, all the accounts of the firm, and then unite with them in endeavoring to adjust the accounts and ascertain the balance; and if he neglect this duty he will lose interest on the balance which may subsequently appear to have been due to him. *id.*
5. The statute exemption from the payment of interest on moneys paid into the treasury of the city of New York by the public administrator, was designed as a compensation for the important public duty of rescuing the effects of aliens and strangers, and preserving them for their creditors and relatives. And it was intended by the legislature that the corporation of the city should have the benefit of the use of the money until it should be claimed by the rightful owners. *Suarez v. The Mayor &c. of New York*, 173
6. The corporation does not stand upon the footing of private trustees, using the trust fund for their own profit or advantage, and is not liable to pay interest on those moneys, unless by reason of some wrongful act or omission. And before paying the fund to a foreign claimant, regard to the public duty as well as the pecuniary liability of the corporation, requires that his right should be very fully established. *id.*
7. The corporation is not put in default as to the payment of the fund in such a case, by a petition to the common council truly exhibiting a rightful claim, where no proof is presented with it. It is the claimant's duty to follow up his petition, and exhibit his proofs to the common council, or to the committees intrusted with its examination. *id.*
8. The allowance of interest as an incident to a debt, is founded on the agreement of the parties: and such agreement may be express or implied. *Stevenson v. Maxwell*, 273
9. It is implied, where there is a contract to pay the principal at a specific time, and the debtor makes default; interest being chargeable from that time, upon the ground of the default. *id.*
10. Where such payment is to be made on the conveyance of land at a stipulated period, and the land is not then conveyed, the purchaser is not in default if he omits to pay the price, and no interest is recovera-

- ble against him until he is put in default by the tender of a deed. *id.*
11. The general rule in England is, that from the time fixed for the completion of a contract for the sale and conveyance of land, the purchaser is entitled to the profits of the estate, and will be compelled to pay interest upon the price. And the agreement to pay interest, is implied from the purchaser's receiving, or being entitled to receive, the rents and profits. *id.*
12. This rule is modified here, by the difference in the situation and productiveness of real estate, and the higher rate of interest; and in the case of vacant or unproductive property, a contract to pay interest will not be implied, when the purchaser is prevented from obtaining his title through the default or negligence of the vendor. The entry into possession of such property ought not to affect the principle. *id.*
13. And where the purchaser does not go into possession, under or in pursuance of the contract of sale, and the delay in its completion is imputable to the seller, he will not be charged with interest on the purchase money, in the absence of an express agreement to pay interest. *id.*
14. S. & M. being joint owners in possession of several lots, under a lease which contained a covenant for the sale and conveyance to the lessees at their option at a fixed price, tendered the price to the lessor's heirs and representatives, and demanded the title; but the latter, by reason of infancy and other causes, were unable for a long period to convey the same. S. then signed an agreement by which he covenanted to execute a perfect conveyance to M. of all his right and interest in one of the lots, (which was vacant,) on the 1st of May, 1830, in consideration of a large price to be then paid or secured by M.; and when the legal title was obtained, he would give any further assurance, &c. S. made no effort to complete, or to convey his own interest to M. at or before the day fixed; and early in 1831, he repudiated the agreement, denied its obligation, and disclaimed M. as being the purchaser. M. nevertheless proceeded, and erected a valuable store on the lot, the income from which exceeded the whole cost of both store and lot; and at the same time he made similar erections on the joint account, on the other lots of himself and S. In 1836, S. filed a bill, amongst other things, calling on M. to complete the purchase of the lot, and a conveyance was finally in readiness for M. in 1841.
- Held*, that M. did not enter into possession under his contract with S., and the character of his previous possession was not changed. That S. was not entitled to interest on the stipulated price from May 1, 1830, nor until he made or offered a full conveyance of his right and title in the lot; but he was entitled to the value of the rents in the intervening period as the same would have been derived from the lot, in the condition in which it was when he contracted to sell to M. *id.*
15. A testator having two bond debts payable on demand with interest, against F. the husband of his granddaughter G., gave one-ninth part of the bulk of his estate to trustees, in trust, first to pay to his executors out of the same, but not out of the annual income or proceeds, all such sums of money as might be owing to him at his decease, by F., and secondly to pay to G. for her life, the net annual income and product of the residue of the trust property or estate, for her separate use. The ninth of the personal estate was not enough to pay half the principal of F.'s bonds. The trustees omitted for several years, to pay off F.'s debt, and used the testator's personal effects to improve his real estate and make it productive. They then claimed that interest should be paid on the debt out of G.'s income from the ninth part.
- Held*, that no interest was payable on the debt of F. after the death of the testator, either out of the net income or the capital of the ninth part. *Jeneway v. Green*, 415
16. *Held*, also that interest was to be computed on the bonds until his death, and paid to the executors. *id.*
17. F.'s debt is to be regarded as one due from a stranger, and it is simply a charge or burthen of a sum in gross, imposed upon the capital of the trust fund, and upon such a charge an obligation to pay interest cannot be implied except upon the plain intention of the person by whom it is granted. *id.*
18. There is no equity in the case which requires G. to pay out of the income such sum as it has been benefitted by the trustees omission to pay the debt of F. *Nem constat*, but that the whole estate has been benefitted in a corresponding degree by such omission. *id.*

See MORTGAGE, 38.

PRINCIPAL AND AGENT, 3 to 9.

USURY, 5 to 7.

IRREGULARITY.

See JURISDICTION, 1.
PRACTICE, 23.

J

JUDGMENT AND EXECUTION.

A judgment recovered for a debt secured by a mortgage on lands, cannot become a lien upon such lands; and a sale of the equity of redemption under an execution upon such judgment, will not confer any title upon the purchaser. And it makes no difference that the judgment was not recovered upon the bond accompanying the mortgage, so long as it was obtained for, or confessed to secure, the same indebtedness. *The Greenwich Bank v. Loomis*, 70

See DEBTOR AND CREDITOR, II.
DECREE, 1 to 5.

JUDGMENT CREDITOR'S SUIT.

See DEBTOR AND CREDITOR, II.

JURISDICTION.

1. The court of chancery does not decide upon the regularity of the proceedings of the supreme court. *Bradford v. Read*, 163. *Storm v. Waddell*; *De Kay v. Waddell*, 494
2. Where the charter of a corporation permits its creditors to sue the stockholders, "in any court having cognizance thereof," a suit may be commenced in equity. *Masters v. Rosie Lead Mining Company*, 301
3. A creditor of a corporation may proceed against it by bill, as well as by petition, under the thirty-sixth section of the revised statutes relative to proceedings against corporations in equity. *id.*
4. The usual judgment creditor's bill, is a sufficient form of proceeding under that section; although the party filing it will not thereby obtain any preference over other creditors. *id.*
5. The charter made the stockholders jointly and severally liable for the debts of the corporation, on the return of an execution at law unsatisfied against the latter. *Held*, that creditors might enforce the liability

without awaiting the issue of a decree, against the corporation. *id.*

6. The court of chancery will not sustain a bill for the mere purpose of construing a will. It is only when questions under the will, arise incidentally in the exercise of the legitimate powers of the court, where it has jurisdiction for some other purpose, that such construction can be given; as in cases of trust, account and the like. *Emmons v. Cairns*, 369
7. Such jurisdiction is maintained, at the suit of one claiming the personal estate after the determination of a life interest, asking to have an account taken and the fund secured; so far as to determine the right of the claimant to the remainder in such fund. *id.*
8. Where a resident of another state owning lands here, conveyed them to a trustee residing here, in trust to sell the same, and out of the proceeds, after paying certain specific sums, to remit the balance to a person residing at the grantor's domicile, to be by him applied rateably upon all the debts of the grantor; and the grantor died insolvent, owing debts at his domicile and in other more distant states, and leaving executors who qualified at his domicile; it was *held*, that any of his creditors might file a bill in this state, in behalf of themselves and all other creditors, against the trustee, the distributor of the fund, and the executors of the grantor; to have the lands sold, the accounts of the trustee taken, and the fund distributed to the creditors. *Slatter v. Carroll*, 573
9. The trust fund being real estate situated here, and the trustee a resident of this state, the jurisdiction of our court of chancery is unquestionable. *id.*
10. And where there are real assets, the court will not hesitate to administer them, although no personal representative has been appointed here; and the foreign executors may, in such a case, be made parties in that capacity. *id.*
11. It is no objection to entertaining the jurisdiction, that the creditor instituting the suit, resides at the place of the grantor's domicile. *id.*
12. The court will direct the fund to be remitted, pursuant to the deed of trust, to the person therein designated, for distribution; or will retain it and distribute it here, according to the circumstances of the case, in re-

ference to the convenience of creditors and of the accounting parties. *id.*

13. In a suit for the foreclosure of a mortgage, it appearing that there was not one hundred dollars actually due and in arrear when the bill was filed, and there being no obstacle to a sale of the premises in parcels; the bill was dismissed on that ground. *Knickerbacker v. Boutwell*, 319

14. The maturing of instalments during the pendency of the suit, so that at the hearing there was more than one hundred dollars in arrear to the complainant on the mortgage, does not aid the jurisdiction of the court, which must be determined by the state of things existing when the suit was commenced. *id.*

15. The court of chancery will grant an injunction against the unauthorized use of a manufacturer's or vendor's trade marks, and will decree the payment of the damages sustained thereby. *Coats v. Holbrook*, 586; *Taylor v. Carpenter*, 603; *Partridge v. Menck*, 622

16. Where the complainants have a legal title to a part of the lands as to which they ask relief against an ejectment, their bill as to such part, will be dismissed. *Harder v. Harder*, 17

See MORTGAGE, 21 to 25.

POWERS.

SPECIFIC PERFORMANCE, 6, 7.

TRADE MARKS.

L

LANDLORD AND TENANT.

Where an order of the court, made in the city of New York, refers to the *amount of the annual rent received* at its date by one entitled to the net income of real estate; the direction is to be deemed as intending the rent for the year ending on the first day of May. *Janeway v. Green*, 415

See ASSESSMENTS.

PARTNERSHIP, 13, 14.

LAPSE OF TIME.

See CONFIRMATION, 3.

LEASE.

See LANDLORD AND TENANT.

LEGACY.

1. Legacies for support and maintenance of a wife and children, otherwise unprovided for, do not abate with the general legacies. *Stewart v. Chambers*, 382

2. A testator having a wife and two small children, and also four adult children by a former wife, after giving legacies to the latter, directed his executors to convert all the residue of his estate and invest it in stocks or on real security, so to remain until the death or marriage of his wife, and until the youngest child should become of full age. Out of the interest and income, they were to pay his wife an annuity half yearly so long as she remained sole, and to his two infant children each an annual sum in half yearly payments, varying according to their age from time to time. Each was to have £1000 on her marriage; and when the youngest became of age and the widow's annuity ceased, the residue was to be divided equally between them. The will further provided in the mean time, that all the surplus interest and income, after paying the annuities, should be divided among the four adult children, semi-annually. The income of the residue of the estate was insufficient to pay the three annuities during ten years that the widow survived. After her death it was more than sufficient to pay the two infants annuities.

Held, that the surplus sums then arising, must be applied to the discharge of the arrears of the three annuities which occurred prior to the widow's death, before any of them could be divided among the adult children. *id.*

3. The direction for a half yearly payment and distribution, was held on the general intent of the will, to be a regulation as to the time of payment to the wife and two minor children, and for a division after they were fully paid. And the testator's intent would be violated by a division of the surplus of any half year, leaving any portion of the annuities unpaid which fell due previously. *id.*

4. But the adults having received a surplus when there were no arrears, would not be required to refund, on the income subsequently becoming deficient to meet the current annuities. *id.*

5. The arrears to the widow became a debt due to her as they respectively accrued, which was a charge upon the income accruing after her death. *id.*

6. An annuity to one of the infants, which on a literal reading of the will was to terminate, on an event that might leave her unprovided for at fifteen, and which did occur when she was twenty; held to continue thereafter in the same manner as her sister's was directed, upon a construction of other clauses in the will, and its general intent. *id.*

7. Legacies directed to be paid in London in sterling money, if paid to the parties here are to be paid at the par of exchange; and if remitted, the executors are to purchase exchange on London for the amount in sterling. *id.*

8. Where a testator bequeathed the dividends of twenty shares of bank stock, and it appeared that he had such shares at the date of his will and afterwards bought eighty shares more; but sold the whole so that he had no such bank stock at his death; the legacy was held to be adeemed. *Newcomb v. St. Peters Church*, 636

9. A bequest to the free school of a church, the interest of which was to be appropriated by the trustees of the church for the use of the school forever, and if the school should not continue, then for the use of the church; was held to be a valid legacy. *id.*

10. A testator gave to his wife for life all the income, rents and profits of his real and personal estate; and after her death gave the like interest to T. for life, out of which she was to support three infants, W., J. and E. Next, he gave the whole rents and income after her death, to W., J. and E. for life, as joint tenants; and then gave the residue of his estate to E. absolutely and in fee, first providing for her fifty thousand dollars when she should arrive at age. Then followed a provision that if E. should die without children or issue, that the whole residue of his estate should go to his cousins.

In a suit by one of the next of kin, in which a construction of the will as to the personal estate became requisite;

Held, 1. That the two first life estates in the income and profits, were valid.

2. That the subsequent gifts of the personal estate were void as suspending the absolute ownership more than two lives in being at the death of the testator.

3. That the legacy of fifty thousand dollars to

E. was contingent on her attaining her full age, and was void for the same cause.

4. That T. was not entitled to enjoy the personal property for life, in specie; but that it must be converted and permanently secured, so as to give her the income, and preserve the capital for the next of kin. *Emmons v. Cairns*, 369

See CHARITABLE USES, 10, 15, 19.
WILL, 26 to 29.

LEGAL ESTATE.

See REMAINDERS.
WILL, 43 to 45.

LIEN.

The term *liens*, in the bankrupt act of congress passed in 1841, is not limited to mere common law liens which are lost whenever their owner parts with the possession of the property. It embraces all cases in which real or personal property is charged with the payment of any debt or duty, without regard to the possession of the property, or the legal or equitable nature of the duty imposed. *Storm v. Waddell*; *De Kay v. Waddell*, 494

See BANKRUPT, 1 to 8.
EQUITABLE MORTGAGE, 1 to 3.
MORTGAGE, 2 to 4, 28.
TRUSTS, 31.

LIMITATION OF ACTIONS.

1. Equity, before the revised statutes, applied the doctrine of limitation of actions, by analogy to the construction and application of the statute in the courts of law in like cases. *Didier v. Davison*, 61

2. A debtor who had failed and whose debt was past due, assured his creditor in writing, that he would pay if he became able. The creditor did not agree to forbear the debt, but he omitted to sue, and the debtor afterwards became able to pay it. *Held*, that the creditor's action accrued on the debt falling due, and not on the debtor's becoming able to pay. *id.*

3. Under the statute of limitations enacted in 1813, it was not necessary that the person relying upon a return to this state as commencing the period of limitation, should have resided here full six years after such return; nor that his residence here should

- have become known to the creditor. It sufficed that the debtor's return was open and public, and made with the intent to reside in the state. *id.*
4. J. residing in the West Indies, in and prior to 1816, became largely indebted to D. & D., merchants in Baltimore. He failed, and went to England, from whence in 1817, he wrote to the D.'s promising to pay when he became able. Subsequently he went to South America and resided there several years. In March, 1834, he came to New York to reside, having sent his family here in the summer of 1833. He declared his intention of becoming a citizen in April, 1834, and he and his family resided here, openly until September, 1835, with the exception of his own temporary absence from March, till July, 1835. In November, 1843, D. commenced a suit in equity in this state against J. to which J. pleaded the lapse of time, setting up as a bar his residence here in 1834 and 1835. *Held*, that the plea was a good bar to the suit. *id.*
 5. A plea of the statute of limitations, setting up two matters, either of which establishes that defence, is not for that cause a double plea. *id.*
 6. The provision of the revised statutes, prescribing a limitation of ten years to suits of exclusive equitable cognizance, does not apply to a right which was vested and perfect before those statutes took effect. *Williamson v. Field*, 533
 7. In general, no statute is to have a retrospect beyond the time of its commencement. And a new statute of limitations, should not be so construed as to cut off or abridge a vested right, unless its language imperatively requires that construction. *id.*
 2. An original bill cannot be filed by such a purchaser, after a decree in the suit pending, to litigate anew or question the subject matter of such suit. *id.*
 3. A mortgage executed by a tenant in common of lands, pending a suit in this court for their partition, becomes a lien on his interest in the land. *Westervelt v. Haff*, 98
 4. If the suit terminates in a decree for a sale, and a sale ensues at which the mortgagor becomes the purchaser of a part of the lands, and on receiving a deed is allowed towards the amount bid, for his share of the proceeds of the whole premises, and omits to pay off the mortgage, it still continues to be a lien as against such mortgagor, upon the land bought by him at such sale. *id.*
 5. And a mortgage executed by him after the sale, for a precedent debt, to one who relinquishes no security or value therefor; will be subject to the lien of such prior mortgage, to the extent of the mortgagor's original interest in the proceeds of the lands held in common. So if after the sale, the mortgagor executes a mortgage to one who has notice of the existence and non-payment of the mortgage given pending the partition. *id.*
 6. A stranger purchasing at such a sale and paying the price, without notice of the mortgage executed *pendente lite*, would be protected against the mortgage. *id.*

See DECREE, 1 to 6.

LOAN.

See USURY.

LUTHERAN CHURCH.

See AGREEMENT, 3.
DEED, 3.

M

MAINTENANCE.

See HUSBAND AND WIFE, 2.

MANUFACTURES.

See TRADE MARKS.

LIMITATIONS IN WILLS, DEEDS &c.

See DEED, 3.
MARRIAGE SETTLEMENT.
WILL, 44, 45.

LIS PENDENS.

1. A purchaser *pendente lite*, will be bound by a decree in the suit, and the complainant need not make him a party, or otherwise notice his purchase. If he desires to defend the suit, he must make himself a party to it by a supplemental bill, before it terminates. *The Greenwich Bank v. Loomis*, 70

MARRIAGE SETTLEMENT.

1. By a marriage contract executed in France by parties domiciled there, on the eve of their marriage, the wife under the provisions of the French law, put one-third of her fortune into *community*, and excluded the residue therefrom, which residue was to belong to her and be re-taken by her. The parties removed to New York, and the husband died there twenty years afterwards. He had taken and used in his business, the whole residue of his wife's property, as well as that of the community. At his death, he was in equity seized of and entitled to real estate in New York.
On a bill filed by his widow, claiming that the marriage settlement operated as a *mortgage* on his whole estate, and that she was entitled to priority of payment of all her demands arising under the settlement,
Held, 1. That according to the laws of France, if the parties had remained there she would have had no preference over other creditors of the husband in respect of his movables, nor any lien by way of *privilege* over his immovables. She would have had a *mortgage* upon his immovables.
2. That although the courts here, construing the settlement according to the *lex loci contractus*, will give to her the same rights as a creditor, that the French law would confer; they cannot and ought not to yield to her over real estate situated here, a lien or priority unknown and repugnant to the laws and regulations of the country *rei sitæ*.
3. Creditors here are entitled to rely upon those laws for the administration of their debtor's estates.
4. The French Civil Code refuses to contracts made in a foreign country, the force of a mortgage in France; and international comity does not require us to pursue a different course.
5. That therefore the complainant, whatever was the extent of her rights as a creditor by reason of the contract of marriage, had no lien upon her husband's estate, nor priority over his other creditors. *Ordronaux v. Key*. 33
2. To make the separate estate of a married woman liable for her debt, where it is not charged upon the estate pursuant to the deed of settlement, it must be shown that the debt was contracted either for the benefit of her separate estate, or for her own benefit upon the credit of the same. *Curtis v. Engel*, 287
3. A general debt incurred by a married woman is not a charge upon her separate es-

tate, nor is such estate chargeable upon any implied undertaking of hers. *id.*

4. A milliner on the eve of her marriage, transferred her fortune, stock in trade and things in action to a trustee for her sole and separate use, without providing for conducting the business in future. After her marriage, the stock was disposed of, and she went to Europe. It was after an interval, resumed by her, in her own name, her husband aiding in its management, but the trustee having no concern with it. *Held*, that the business was not conducted for the benefit of her separate estate, and the latter was not chargeable with the debts contracted therein. The business was in point of law the husband's, and the profits belonged to him.

And upon the evidence, it was held that the goods furnished to her and her husband in the millinery business, were not sold upon the credit of her separate estate. *id.*

MARRIED WOMAN.

See HUSBAND AND WIFE.

MERGER.

See MORTGAGE, 58.

MISJOINDER.

1. An objection to the bill for the misjoinder of complainants, will not be regarded, when it is raised for the first time at the final hearing of the cause. *Harder v. Harder*, 17
2. The complainants purchased of T. distinct portions in severalty, of a lot of land, by contracts providing for their conveyance, at a future day. T. was in possession under a like contract from the defendant, who was seized of the land. Another contract had been given by the defendant to M. and he refused to convey to the complainants, except subject thereto. Thereupon one of them, W., in behalf of the whole, and for their protection, bought M.'s contract. The defendant then ejected the complainants severally, and they exhibited their bill against him, praying for an injunction and a conveyance of the land to W. for their benefit. *Held*, on demurrer, that there was no misjoinder of complainants, but that T. was a necessary party to the suit. *Wood v. Perry*, 7

3. It is a fatal objection to a suit that a part of the complainants do not show any title to participate with the others in the relief sought. *Cammeyer v. United Lutheran Churches*, 186

MISNOMER.

See WILL, 4 to 6, 29.

MISREPRESENTATION.

See SPECIFIC PERFORMANCE, 13 to 16.

MONIED INCORPORATIONS.

See CORPORATIONS, 14 to 25.

MORTGAGE.

- I. Of the consideration and its sufficiency; of the validity of mortgages; and of the proof thereof, and of parol evidence.
- II. Of mortgages to secure future advances, and their priority.
- III. Mortgages given for the purchase money; and herein of defence to their payment on the ground of failure of title; and of dower in the mortgaged premises.
- IV. Of the recording of mortgages; and of notice.
- V. Of the rights of mortgagor and mortgagee; of subrogation, substitution, and surety. Also of further or collateral security.
- VI. Assignment of mortgage, and the rights consequent thereupon.
- VII. Effect of purchase subject to a mortgage, and assuming its payment; and remedies of various persons thereupon.
- VIII. Of the payment and satisfaction of mortgages, and of the discharge of mortgaged premises.
- IX. Foreclosure; *Lis Pendens*; and Decree.

MORTGAGE, I.

Of the consideration and its sufficiency; of the validity of mortgages, and of the proof thereof: and of parol evidence.

1. It is not a badge of fraud in a mortgage, that it was taken after the creditor learned of the debtor's intention to secure another creditor by a mortgage on the same land. *Craig v. Tappin*, 78
2. A mortgage executed by a tenant in common of lands, pending a suit in this court

for their partition, becomes a lien on his interest in the land. *Westervelt v. Hoff*, 98

3. If the suit terminates in a decree for a sale, and a sale ensues at which the mortgagor becomes the purchaser of a part of the lands, and on receiving a deed is allowed towards the amount bid for his share of the proceeds of the whole premises, and omits to pay off the mortgage, it still continues to be a lien as against such mortgagor, upon the land bought by him at such sale. *id.*
4. And a mortgage executed by him after the sale, for a precedent debt, to one who relinquishes no security or value therefor; will be subject to the lien of such prior mortgage, to the extent of the mortgagor's original interest in the proceeds of the lands held in common. So if after the sale, the mortgagor executes a mortgage to one who has notice of the existence and non-payment of the mortgage given pending the partition. *id.*
5. Where an agent purchases land in his own name, at the request and for the benefit of his principal, and gives his own bond and mortgage for the purchase money, in which the principal joins ostensibly as surety; it is competent to prove by parol evidence, that the latter is the principal in the transaction, and the agent the surety. *The Mohawk and Hudson Rail Road Company v. Costigan*, 306
6. One who executes a bond and mortgage to another without consideration, or places the same in the hands of the latter, for a particular purpose which is not accomplished; will become liable to pay the mortgage debt to a stranger who advances money or property upon it, if he does any act from which such stranger is authorized to infer that the securities are valid. *Day v. Perkins*, 359
7. A bond and mortgage were executed by three persons to C. on a leasehold property, the principal value of which consisted in a white lead manufactory, with steam engine, machinery and other fixtures, with which those persons conducted business together. The premises were insured in the names of two of them, P. and T. The three deposited the bond and mortgage with C., for him to raise money in their behalf. C. gave no consideration for the bond and mortgage. Being unable to raise the money, C. some months afterwards delivered them to D. as security for a loan of stocks made to him thereon. The stocks not be-

ing replaced when due, D. called on P. and T. to assign to him the policy of insurance, which they did, without questioning his right to the securities.

Held, that this was evidence of a loan of the bond and mortgage to C.; and the consideration paid to him by D. was sufficient to support them against the mortgagors. *id.*

8. *Held*, also from the nature of the property and the business conducted, and the joint interest of the mortgagors, that they were to be deemed partners; and from this, and his joining in executing the bond and mortgage and suffering them to remain with C., that the third partner was bound by P. and T.'s transfer of the policy and its consequences. *id.*

9. The ratification of C.'s acts, was held to extend to support an advance which D. was compelled to make to another party, to whom C. had given a prior equitable claim on the bond and mortgage. *id.*

10. As between mortgagor and mortgagee, fixtures put up for manufacturing, on property leased for years, are included in and pass by a mortgage of the land. *id.*

11. Under an order of the court of chancery, authorizing a trustee to execute mortgages on lands, in which he has a life estate, and his children an estate in fee, to secure moneys already advanced to him and debts owing by him, as also moneys to be advanced or lent to him; and authorizing him, amongst other things, to apply the moneys to the payment of his debts, and invest the surplus so as to yield an income for the support of his family; it was *held*, that he could not execute a mortgage for clothing thereafter to be furnished for himself or his children, nor upon a verbal or written agreement to advance money at a future day. *Williamson v. Field*, 533

12. A mortgage was executed to secure sundry liabilities incurred for the accommodation of the mortgagor. It recited the execution of his bond of the same date and tenor with the mortgage, but no such bond was ever delivered. The mortgage was nevertheless held to be valid. *Goodhue v. Berrien*, 630

13. Where such a mortgage was given upon leaseholds and household furniture, but was not filed pursuant to the act of 1833, till seven months after it was given, was never renewed according to that act, and there never was any change in the possession of the furniture; it was *held*, that the entire

mortgage was fraudulent and void as against creditors, although as to the leaseholds there was a change of possession. *id.*

14. Where the witness sworn by a commissioner of deeds, to identify the grantor in a conveyance, on the latter's appearing to acknowledge the execution of such conveyance, is the grantee therein, or otherwise interested in sustaining its execution; the certificate of the officer of its due acknowledgment, furnishes no proof of its execution. *id.*

15. A subscribing witness testified to his own signature to a mortgage, and that it was signed and acknowledged by a person who was introduced to him as the mortgagor. Another witness identified the signature thus made, as that of the mortgagor. *Held*, that the mortgage was sufficiently proved. *id.*

16. A mortgage, attested by a witness who was previously unacquainted with the grantor, is not an unattested conveyance within the meaning of 1 R. S. 738, § 137. *id.*

MORTGAGE, II.

Of mortgages to secure future advances, and their priority.

17. A mortgage to secure future advances is valid. It is not necessary that such a mortgage should express that object on its face. It suffices that the extent of the intended lien be clearly defined. But the omission to state the object, renders the mortgage liable to suspicion, and imposes upon the mortgagee stricter proof of the payment of the consideration. *Craig v. Tappin*, 78

18. As between a mortgage to secure future advances and a subsequent mortgage on the same premises for an existing debt, the latter is valid and takes precedence over all advances made upon the former, after such second mortgage is executed. But those made before that time, though after the first mortgagee knows of the intention of the debtor to execute it, are valid against the latter. *id.*

19. The policy of the registry laws, does not affect the question of its validity in this respect. *id.*

20. On a mortgage to secure liabilities incurred for the accommodation of the mortgagor, the mortgagee's claims which arose

after the docketing of a subsequent judgment against the mortgagor, will be postponed to the judgment. *Goodhue v. Berrien*, 630

MORTGAGE, III.

Mortgages given for the purchase money; and herein of defence to their payment on the ground of failure of title; and of dower in the mortgaged premises.

21. Where the title to real estate fails, the purchaser has no remedy in equity to recover back the price, unless there was fraud or deceit in the sale. *Banks v. Walker*, 344
22. The only recognized ground of equitable interference to stay the collection of the unpaid purchase money, in the absence of fraud, is a failure of the consideration by reason of a defect of title clearly established, and an eviction from the possession of the land. *id.*
23. These facts may be shown as a defence, when the collection is attempted in chancery, notwithstanding the deed contains covenants of title. *id.*
24. An eviction is established by proof that at the time of the purchase, the lands sold were actually occupied under a valid hostile title, so that the purchaser could not obtain possession of the same; and whereby he never did obtain actual possession. *Withers v. Codwise*, 350
25. In a suit for the foreclosure of a mortgage, the defendant set up that the mortgage was given for the purchase money, that the lands were conveyed to him without covenants, and that one claiming a paramount title had commenced an ejectment for the recovery of the lands, which was in vigorous prosecution, and if successful, would divest all the mortgagor's title except a dower right. The defendant entered into the possession of the lands at the time of his purchase, and had not been turned out or evicted.
The defence was overruled, and a decree made for the sale of the lands, and against the mortgagor for the deficiency, in case the proceeds of the sale were insufficient to pay his bond accompanying the mortgage. *Banks v. Walker*, 344
26. W. being seised of the lands subject to a mortgage, which had not been executed by his wife, conveyed them to D., his wife

joining with him in due form. D. subsequently reconveyed them to W.
Held, that the wife's inchoate right of dower was extinguished by the deed to D. and was not restored as against the mortgage by the reconveyance; and that she was dowerable of the equity of redemption only. *Hoogland v. Watt*, 147

MORTGAGE, IV.

Of the recording of mortgages; and of notice.

27. Notice to the solicitor of a subsequent mortgagee, who prepares the securities in his behalf, is notice to the client. *Westervelt v. Haff*, 98

See MORTGAGE, I to 4, 17 to 19.

MORTGAGE, V.

Of the rights of mortgagor and mortgagee; of subrogation, substitution, and surety. Also of further or collateral security.

28. A judgment recovered for a debt secured by a mortgage on lands, cannot become a lien upon such lands; and a sale of the equity of redemption under an execution upon such judgment, will not confer any title upon the purchaser. And it makes no difference that the judgment was not recovered upon the bond accompanying the mortgage, so long as it was obtained for, or confessed to secure, the same indebtedness. *The Greenwich Bank v. Loomis*, 70
29. The wife of J. W. being seised of lands, joined him in executing three several mortgages to secure his bonds for money lent. Before his death, his attorney, with means furnished by him, paid the mortgagees, and took an assignment of the bonds and mortgages, to S., who soon after gave J. W. a certificate that he held them in trust for J. W. and subject to his order and control.
Held, that J. W. was the principal debtor, and his wife's lands stood in the relation of a surety for his debt. And that after the assignment and certificate, the securities belonged to him in equity, and the lands were thereby discharged from the lien of the mortgages. *Fitch v. Cothrel*, 29
30. *Held* also, that one who subsequently purchased the mortgages of S. in good faith and without notice, could not enforce them against the widow of J. W. and her heirs; but such purchaser was exempted from costs, after an unsuccessful defence. *id.*

31. A prior mortgagee of lands took further security by a mortgage of goods, and afterwards took possession of the goods. *Held*, that he had the option to sell them at auction and credit the proceeds on his debt, or to keep them and account for their market value; and having retained them, he was decreed to account for such value. *Craig v. Tappin*, 78
 32. C. owning lands in New Jersey, subject to a mortgage to W. for \$4000 sold a part of the same to H., for a sum equal to the mortgage; and H. agreed to pay W. \$1000 of the price, and to mortgage to him the part so bought, for the residue. Instead of paying the \$1000, H. gave to W. a mortgage therefor, on lands in New York, and then mortgaged to him the lands bought of C. for the whole \$4000; payable in four years; upon which W. discharged C.'s mortgage. The mortgage for \$1000 was payable in one year, and as expressed in it, was collateral to the other. The New Jersey lands were not worth the \$4000. *Held*, 1. That the mortgage for \$1000 was not in fact collateral to the other. 2. If it were, that it could be collected when due, without waiting for the other to mature. And, 3. When the remedy on the principal mortgage is manifestly inadequate, the collection of the collateral security will not be postponed till the former has been exhausted. *Westervelt v. Haff*, 98
 33. Where a creditor of N. holds as his security, for a specific debt, a mortgage of N. against H., which by an agreement between themselves, N. is bound to discharge; and N. makes a payment to his creditor on the specific debt; such payment enures to the benefit of H. in respect of the mortgage, and the creditor cannot retain H.'s mortgage by subsequently making an application of the payment on other debts due to him from N. *The N. Y. Life Insurance and Trust Company v. Howard*, 183
 34. By force of the agreement, the payment made by N. operates as a discharge of so much of H.'s mortgage. *id.*
 35. N. absconded, and the creditor obtained some security from him, though far less than his other debts. H. is not entitled to participate in the benefit of such security to reduce his mortgage. *id.*
 36. On a decree against two defendants who are jointly personally liable for the mortgage debt, either party on paying the demand, may proceed upon the foot of the decree, to compel contribution from the other party. *The North American Fire Insurance Company v. Handy*, 492
 37. Where an agent purchases land in his own name upon the request and for the benefit of his principal, pays part of the consideration, and gives his mortgage for the residue, with a bond in which his constituent joins; the agent is a surety for his constituent in respect of such bond; and equity will decree that he be paid his advance and indemnified against the bond and mortgage, on his conveying the title to the principal; and it is competent to prove by parol evidence that in such a purchase, the party receiving the deed and executing the mortgage, is a surety in respect of the latter. *The Mohawk and Hudson Rail Road Company v. Costigan*, 306
- See MORTGAGE, 39 to 41; 46 to 48, 49, 50.
- MORTGAGE, VI.
- Assignment of mortgage, and the rights consequent thereupon.*
38. A long and intricate litigation had been pending in two different suits in this court, for several years, in one of which N. sought to enforce a large mortgage upon lands which M. claimed by a prior right, and G. and S., two other mortgagees, also asserted rights, in part adverse to both. N.'s suit had abated, and in the other suit M. had a favorable report from a master of the court. Thereupon M. and N. agreed that N. should buy in the claims of G. and S. at a discount; and M. was to receive a fund in court in the other suit. N. was to proceed and foreclose his large mortgage as well as those thus purchased, and sell all the lands mortgaged. Out of the proceeds of sale and prior rents, N. was to retain his advances to G. and S. with interest, and all but \$2000 of the sum taken out of court by M. with five per cent. interest. The residue was to be equally divided between M. and N.
- N. immediately bought the mortgages of G. and S., but neglected to proceed to foreclose and sell, for four years, by which a loss ensued to the extent of the whole intermediate interest on the value of the property. In his answer to the suit for that object, (which was a revivor of the old suits with supplemental matter,) M. set up and proved such neglect.
- Held, First.* That the agreement, in substance though not in form, was a stipulation in those suits, disposing of the rights of the parties who executed it.
- Second.* That M. could insist upon his rights

- under the agreement, in adjusting the distribution of the fund in the revived and supplemental suit.
- Third.* That N. was bound to foreclose the securities and effect the sale with reasonable diligence.
- Fourth.* That having omitted such diligence, he was not entitled to charge interest on the sums stipulated for him out of the proceeds, beyond the period when by reasonable diligence, such proceeds might have been realized. And the subsequent taxes were also disallowed.
- Fifth.* That a request by M., made after that period, not to sell during his temporary absence from the country, was not an acquiescence in the previous delay.
- Sixth.* That M. could not be allowed upon his answer, for interest on his half of the surplus proceeds after the date when the sale ought to have been completed. *The North American Fire Insurance Company v. Mowatt*, 108
39. S. a simple contract creditor of M. arranged with M. and a surety of M. on sundry debts, to whom M. had given a mortgage as security, that M. should discharge part of the mortgagee's liabilities and S. the residue, upon which the mortgage was to be assigned to S.; and the arrangement was consummated. *Held*, that S. could not enforce the mortgage for any more than he advanced, against a judgment docketed against M. before the assignment. *Yelverton v. Sheldon*, 481
40. In respect of the judgment, the mortgage was discharged to the extent of the liabilities of the mortgagee which were paid by M. *id.*
41. Another debt could not be substituted and secured by the mortgage, in lieu of the extinguished liabilities so as to give it priority over the judgment. *id.*
- See MORTGAGE, 6 to 9; 29, 30.
- MORTGAGE, VII.
- Effects of purchase subject to a mortgage, and assuming its payment; and remedy of various persons thereupon.*
42. Where land is conveyed subject to a mortgage for which the grantor is personally liable, and the deed declares that the grantee is to pay the mortgage as a part of his purchase money; he is liable to the grantor for the amount of the mortgage, as the same becomes due, in an action of assumpsit. *Rawson's Administratrix v. Copland*, 251
43. If the grantee executes the deed, he will be liable therefor in an action of covenant. The contract made by the assumption in the deed, is not one of indemnity merely. It is a contract to pay; and the grantor in the deed may enforce it without actual payment made by him. *id.*
44. The liability of the grantee by force of such an assumption, is a demand against him, which in the event of his death, may be set off in favor of the grantor, in a suit brought by the legal representatives of the grantee upon a contract for the payment of money. *id.*
45. B. bought four lots of ground, and executed mortgages thereon to P. for the purchase money. Then B. sold and conveyed the lots to C. subject to the mortgages, which the latter by the deed, was to pay as a part of the price. C. sold and conveyed the lots to R. in the same manner. After R.'s death, the mortgages were foreclosed, the lots were sold, and there was a large deficiency in satisfying the mortgage debt which B. paid to P. B. then demanded the same of C., who paid him by his own bond and a mortgage on land. In a suit by R.'s administratrix to foreclose a bond and mortgage given by C. to R., it was held that the amount of the deficiency was a demand existing against R. in his lifetime, which C. might set off against the bond and mortgage sought to be foreclosed. Also held that the costs paid by C. to B. were not within the contract of R., and could not be set off. *id.*
46. Where one purchases land which is subject to a bond and mortgage executed by his grantor, and in his deed assumes and agrees to pay the mortgage; he is liable to his grantor to pay the same as a part of the price or consideration of the land. *Bliser v. Monholland*, 478
47. As between him and the mortgagor, the latter thereupon becomes a surety for the former, in respect of the mortgage debt. *id.*
48. The obligation of the purchaser to pay the debt, enures in equity to the benefit of the mortgagee; and he may enforce it against the purchaser, to the extent of the deficiency, in a bill to foreclose his mortgage. *id.*
- See MORTGAGE, 29, 30.

MORTGAGE, VIII.

Of the payment and satisfaction of mortgages, and of the discharge of mortgaged premises.

49. Where a church claiming two legacies, as to which the executors entertained doubt, received the same from the executors, and executed to them a bond and mortgage for the amount, payable in three years; but which were given solely for their indemnity: it was *held*, after the lapse of twenty-six years, that the residuary legatees could not enforce the mortgage, although the church was not entitled to receive the legacies so paid by the executors. *Newcomb v. St. Peters Church*, 636
50. The mortgage created no trust or confidence between the church and the residuary legatees; and the presumption from lapse of time, that it was paid or satisfied; is conclusive. *id.*
51. A solicitor or agent who is employed to procure the assignment of a bond and mortgage, or to invest money upon such securities, is not thereby authorized to receive either the principal or interest, when his client or constituent takes and retains the possession of the securities. *Williams v. Walker*, (325,) 225
52. When in such cases, the solicitor or agent, is expressly authorized to collect the interest, the debtor is not warranted in inferring that he is authorized to receive the principal debt. *id.*
53. The debtor is authorized to infer, that the solicitor or agent is empowered to receive both interest and principal, from his having possession of the bond and mortgage. *id.*
54. So if he have the possession of the bond, without either the mortgage or the assignment. *id.*
55. But such inference being founded upon the custody of the securities, ceases whenever they are withdrawn by the creditor; and it is incumbent upon the debtor who makes payments to the solicitor or agent, relying upon such inference, to show that the securities were in his possession, on each occasion when the payments were made. *id.*
56. The authority thus implied from the possession of the securities, is not limited to a receipt of the whole principal in one sum. It is like the authority of an attorney employed to collect a debt, who may exercise a discretion as to receiving it in partial payments. *id.*
57. Where a solicitor who had effected a loan on bond and mortgage, received a part of the principal debt while he had the possession of the securities, and subsequently received the whole debt after they had been withdrawn from him, but never paid to the lender any part of the principal, though he continued to pay her interest on the entire sum, as if it were collected from time to time on the bond and mortgage; it was held that the payments of principal received by him while he held the securities were valid, and that those paid afterwards did not impair the bond and mortgage. And that the mortgagor was not entitled to be credited towards the debt, the interest which the solicitor paid out of his own funds to the lender previous to the discovery of his fraud, upon that portion of the principal which was discharged by the payments held to be valid. *id.*
58. A purchaser of two city lots took an assignment of an old mortgage which included those and ten other lots. By the various *mesne* conveyances from the mortgagor, the two lots were subject to a portion of the mortgage as between them and three other of the twelve lots, and in common with those three, to a larger proportion of the mortgage as between them and the remaining seven lots. On a bill by such purchaser to foreclose the mortgage, and praying for a sale of the twelve lots;
Held, 1. That the charge upon the two lots being imposed by the recorded deeds and mortgages thereon, executed by those through whom the complainant derived his title; actual notice to him was of no consequence.
2. That as to so much of the mortgage as was at all events to be paid by the two lots, there was an absolute merger when the complainant received an assignment of the mortgage, and an extinguishment of so much of its amount. But that as to the residue thereof, (including the part for which his two lots were liable only in the event of a deficiency in the three with which they were charged in the larger proportion,) there was no merger. *Knickerbacker v. Boutwell*, 319
59. Where a creditor accepts the debtor's bond and mortgage in payment, it is as to third persons equivalent to an actual payment. *Semble. Rawson's Administratrix v. Copland*, 253

See CONFIRMATION, 3.

MORTGAGE, 29, 30 ; 33 to 35 ; 39 to 41.

MORTGAGE, IX.

Foreclosure ; Lis Pendens ; and Decree.

60. Where the bill states a mortgage, apparently valid for the whole sum expressed in it, and then avers that it was given for a smaller sum previously advanced and also to secure future advances, the defendant cannot rely upon one of these averments as an admission in his favor and at the same time exclude the other. *Craig v. Tappin*, 78
61. A bill to foreclose a mortgage, need not allege an indebtedness for which it was given, and if alleged it need not be proved. *Day v. Perkins*, 360
62. A bill by a mortgagee against the mortgagor, to foreclose a mortgage, and also against one who claims the land adversely to both ; would be multifarious. *Banks v. Walker*, 344
63. Where a mortgagee, in a suit to foreclose a mortgage seeking a decree over against two joint guarantors ; on a defense being made by one, compromised with, and released him ; it was held that he could not take a decree for the deficiency against the other guarantor, who had suffered the bill to be taken as confessed, but he was left to his remedy at law. *North American Fire Insurance Co. v. Handy*, 492
64. In equity as well as at law, if the demand against two defendants be joint and not several, a successful defence by one, will enure to the benefit of the other, though the latter suffers the suit to go by default. *id.*
65. It appearing, at the hearing, that there was not one hundred dollars actually due and in arrear when the bill was filed, and there being no obstacle to a sale of the premises in parcels ; the bill was dismissed on that ground. *Knickerbacker v. Boutwell*, 319
66. The maturing of instalments during the pendency of the suit, so that at the hearing there was more than one hundred dollars in arrear to the complainant on the mortgage, does not aid the jurisdiction of the court, which must be determined by the state of things existing when the suit was commenced. *id.*
67. S. a simple contract creditor of M. arranged with M. and a surety of M. on sundry debts, to whom M. had given a mortgage as security, that M. should discharge part of the mortgagee's liabilities and S. the residue, upon which the mortgage was to be assigned to S. ; and the arrangement was consummated. *Held*, that S. could not enforce the mortgage for any more than he advanced, against a judgment docketed against M. before the assignment. S. having given up to M. his note on receiving the assignment, expecting to collect his debt upon the mortgage, and insisting upon such right ; it was held that M. was a necessary party in a suit by the judgment creditor to redeem the mortgage. *Yelverton v. Sheldon*, 481
68. It was also held that the mortgagee was not a necessary party to such suit. *id.*
69. In a suit to foreclose the equity of redemption in lands mortgaged and to sell the lands, all persons having an interest in the equity of redemption should be made parties. *Williamson v. Field*, 533
70. This was held of persons having a vested equitable remainder in fee in the equity of redemption, and that their rights were not affected or impaired by a decree of foreclosure and sale in a suit to which they were not parties, although the trustee vested with the legal title was made a defendant. *id.*
71. The fact that the trustee executed the mortgage of the estate under the authority of the court of chancery, and with the sanction and joint execution of a master of the court, as prescribed in the order ; was held not to excuse the omission to make the remaindermen parties. *id.*
72. As a general rule, cestuis que trust must be made parties, where the equity of redemption is vested in a trustee for their benefit. But where there are remote trust limitations, it suffices to bring before the court the beneficiaries *in esse*, who have the first estate of inheritance, together with those having the precedent estates and prior interests, and the trustee. *id.*
73. An order upon a purchaser under a decree of foreclosure to complete the sale, made on a specific objection taken to the title ; does not decide a question of title or of parties, which was not made the ground of objection, or brought to the consideration of the court. And such order is not a protection to the purchaser, against persons hav-

ing vested interests in the equity of redemption; who ought to have been, but were not, made parties to the foreclosure. *id.*

74. Chancery will not compel a purchaser in good faith under its decree, to take a defective title, where the defect is brought to its notice; but it does not undertake that none but good titles shall be sold under its directions. *id.*

75. A purchaser *pendente lite*, will be bound by a decree in the suit, and the complainant need not make him a party, or otherwise notice his purchase. If he desires to defend the suit, he must make himself a party to it by a supplemental bill, before it terminates. *The Greenwich Bank v. Loomis*, 70

76. An original bill cannot be filed by such a purchaser, after a decree in the suit pending, to litigate anew or question the subject matter of such suit. *id.*

77. After a decree has been made by the chancellor, it is not competent for any vice-chancellor to make any order or decree which would directly or indirectly discharge, alter or modify the same.

Held accordingly, where after a decree of foreclosure and sale obtained by default in a mortgage suit before the chancellor; a purchaser *pendente lite*, of the lands mortgaged, filed a bill before a vice-chancellor, praying for an adjudication that the mortgage never was a lien, or if it were that it belonged to such purchaser, and that the defendant in such suit from whom he bought, had a claim to the lands prior to the mortgage. *id.*

78. A stranger purchasing at a sale in partition and paying the price, without notice of a mortgage executed *pendente lite*, will be protected against the mortgage. *Westervelt v. Haff*, 98

See EQUITABLE MORTGAGE.

MORTGAGE, 2 to 4; 21 to 25; 36, 38, 46 to 48.

MULTIFARIOUSNESS.

See PLEADING, 7, 11, 14.

N

NEW YORK, CITY OF.

See ASSESSMENTS.

EXECUTORS AND ADMINISTRATORS, 5 to 8.

NOTICE.

Notice to the solicitor of a mortgagee, who prepares the securities in his behalf, is notice to the client. *Westervelt v. Haff*, 98

See MORTGAGE, 2 to 4; 78.

P

PAROL AGREEMENT.

See FRAUDS, STATUTE OF.

MORTGAGE, II.

SPECIFIC PERFORMANCE, 2 to 5.

PAROL EVIDENCE

See EVIDENCE, 1, 2.

WILL, II.

PARTIES.

1. The complainants purchased of T. distinct portions in severalty, of a lot of land, by contracts, providing for their conveyance, at a future day. T. was in possession under a like contract from the defendant, who was seized of the land. Another contract had been given by the defendant to M. and he refused to convey to the complainants, except subject thereto. Thereupon one of them, W., in behalf of the whole, and for their protection, bought M.'s contract. The defendant then ejected the complainants severally, and they exhibited their bill against him, praying for an injunction and a conveyance of the land to W. for their benefit. Held, on demurrer, that there was no misjoinder of complainants, but that T. was a necessary party to the suit. *Wood v. Perry*, 7

2. Where the charter of a corporation permits its creditors to sue the stockholders "in any court having cognizance thereof," a suit may be commenced in equity against the corporation and the stockholders conjointly. *Masters v. The Rossie Lead Mining Company*, 301

See ACCOUNT, 1.

CORPORATIONS, 21 to 24, 26, 27, 30, 31.

MORTGAGE, 67 to 75.

PARTITION.

See MORTGAGE, 2 to 4.

PARTNERSHIP.

1. In copartnership cases, where the written agreement between the parties is doubtful in its terms, their subsequent conduct under it, is admissible in aid of the construction of the instrument and determining the question of intent. *Beacham v. Eckford's Executors*, 116
2. There is no general rule fixing the date of the dissolution of a partnership as the period from which interest is to be computed against the partner who is indebted to his associate. *id.*
3. The allowance or refusal of interest in such cases, depends upon the circumstances of each. *id.*
4. E. in New York and B. in Baltimore, were partners in building a frigate in Baltimore, and subsequently in conducting a ship-yard there. E. made the advances on building the frigate and received the price; and in 1827, three years before the dissolution, was aware in general terms that in a settlement of their accounts there would be a large balance due to B. but he did not know what such balance was. There never was any settlement made between the partners. The accounts were kept at Baltimore, and there were extensive transactions afterwards, so that at the dissolution, in 1830, though E. might have well inferred that he owed B., he had no means of ascertaining what was the true balance. E. in 1827, applied to B. for an account, which B. promised to send from time to time, but it was never sent. And E. neglected to furnish his accounts to B. when requested. E. died in 1832, and there was no accurate statement of the accounts made out until 1837, after a suit was commenced by B.'s assignees against E.'s executors, for a settlement. Such statement was then made known to the executors; and it thereby appeared that there was a balance of more than \$27,000 due from E. to B. in 1830. *id.*
5. Held, that both parties had been remiss in their duty; that B. should have furnished his accounts so as to put E. in default; that E.'s executors should not be charged with interest from the date of the dissolution on the balance afterwards found to have been then due from E.; but that they were liable to pay interest from 1837, the date when they were authentically informed of the extent of such balance, because although the suit was then in progress, they might have paid the ascertained amount into court for the benefit of B.'s assignees. *id.*
6. On the dissolution of a partnership between persons residing at different places, it is the duty of each partner to furnish to the other all their accounts, and to endeavor to adjust them and ascertain the balance; and when the same is ascertained, the one indebted must pay such balance. *id.*
7. This is especially the duty of the partner at the place where the principal business has been transacted. *id.*
8. Upon the death of a copartner, this duty becomes imperative upon the survivor, and if he neglect it, he will lose interest on the balance which may subsequently appear to have been due to him. *id.*
9. In a suit by the assignees of one partner against the executors of the other, for a settlement of the partnership accounts, it appeared that both parties had been in default; the accounts were intricate, the questions upon them doubtful, and though a large balance was found due, a portion of the claim equally large, was disallowed. No costs were given to either party. *id.*
10. Where real estate was purchased by two partners, with the funds and for the business of the copartnership, and one of them died leaving the firm without personal property sufficient to pay its debts; it was held that the real estate was in equity to be treated as personal property, and the surviving partner had an absolute right to dispose of it as such, for the payment of the debts of the firm. *Delmonico v. Guillaume*, 366
11. As it respects the partners and their creditors, real estate belonging to the partnership, is in equity subjected to the same general rules as personal property. *id.*
12. A farm was purchased by two partners, in their joint names, for the partnership business, was used in that business, and paid for out of the funds of the firm. At the dissolution by the death of one of the partners, the debts of the firm exceeded its personal assets, and the survivor entered into a con-

tract to sell a part of the farm. On a bill filed by him against the purchaser, for a specific performance, to which the heir of the deceased partner was a party, it was held that the survivor was entitled to sell the property, and performance was decreed with a direction that the heir should join in the conveyance. *id.*

13. A bond and mortgage were executed by three persons to C. on a leasehold property, the principal value of which consisted in a white lead manufactory, with steam engine, machinery and other fixtures, with which those persons conducted business together. The premises were insured in the names of two of them, P. and T. The three deposited the bond and mortgage with C., for him to raise money in their behalf. C. gave no consideration for the bond and mortgage. Being unable to raise the money, C. some months afterwards delivered them to D. as security for a loan of stocks made to him thereon. The stocks not being replaced when due, D. called on P. and T. to assign to him the policy of insurance, which they did, without questioning his right to the securities.

Held, that this was evidence of a loan of the bond and mortgage to C.; and the consideration paid to him by D. was sufficient to support them against the mortgagors.

Held, also from the nature of the property and the business conducted, and the joint interest of the mortgagors, that they were to be deemed partners; and from this, and his joining in executing the bond and mortgage and suffering them to remain with C., that the third partner was bound by P. and T.'s transfer of the policy and its consequences. *Day v. Perkins*, 359

14. Such a leasehold is in equity subject to the incidents of the personal property of a partnership. *id.*

15. A creditor of a copartnership cannot proceed in equity against the estate of a deceased partner, without showing that he has exhausted his remedy at law against the surviving partners; or that a resort to legal process against them would be unavailing. *Slatter v. Carroll*, 573

16. This may be established by proof that the survivors are insolvent and have no visible property or assets liable to execution. *id.*

PART PERFORMANCE.

See SPECIFIC PERFORMANCE, 5.

PATENT.

See TRADE MARKS, 11.

PAYMENT.

See LEGACY, 2 to 7.

MORTGAGE, 33 to 35; 39 to 45; 58, 59.

PRINCIPAL AND AGENT, 3 to 9.

PERPETUITIES.

See WILL, 18 to 25.

PERSONAL ESTATE, SUSPENSE OF OWNERSHIP OF.

See WILL, 36 to 42.

PERSONAL SUCCESSION.

1. It is an universal principle of jurisprudence at this day, in civilized countries, that the succession of personal or movable property, wherever situated, is governed exclusively by the law of the country where the decedent was domiciled at the time of his death. *Suarez v. Mayor, &c. of New York*, 173

2. A decree against the primary administrators of an intestate, in a suit relative to the succession of movable property, conducted in due form and between proper parties, at the place of his domicile in a foreign country; is conclusive upon a subsidiary administrator appointed here, in respect of the rights of the parties which were therein adjudicated. *id.*

3. This was held of a decree in the Superior Court of Justice for the District of Carthagena in the republic of New Grenada, establishing the right of a party as next of kin of an intestate; the question arising in a suit by such party to recover assets obtained by an administrator appointed here. *id.*

4. The same right also sustained upon proof of the laws of succession in New Grenada. *id.*

5. Where the principal administrator at an intestate's domicile, in a foreign country, allots to a party as his next of kin, divers things in action existing here, and makes a transfer and delivery of the same so far as is practicable; such party is entitled to receive the things in action from the administrator

here, in the absence of creditors claiming the fund. *id.*

6. On such an administration here, it appearing that the claimant would be entitled at the domicile of the intestate, to receive the entire fund, all other claimants having been ascertained and paid by the principal administrator there; the fund will be paid directly to such claimant without remitting it to the intestate's domicile. *id.*

PLEADING.

- I. *Bill; Supplemental bill; Bill to affect or alter decree; Bill of review; Averments in bill and when sustained; Variance; Multifariousness; Bill or petition.*
 II. *Answer, and what proof sustains; Setting up Bankrupt discharge, and Statute of Frauds, and Usury.—Plea.*

PLEADING, I.

Bill; Supplemental bill; Bill to affect or alter decree; Bill of review; Averments in bill, and when sustained; Variance; Multifariousness; Bill or petition.

1. A purchaser *pendente lite*, will be bound by a decree in the suit, and the complainant need not make him a party, or otherwise notice his purchase. If he desires to defend the suit, he must make himself a party to it by a supplemental bill, before it terminates. *The Greenwich Bank v. Loomis*, 70
2. An original bill cannot be filed by such a purchaser, after a decree in the suit pending, to litigate anew or question the subject matter of such suit. *id.*
3. A bill of review can only be filed after enrolment, and then only for error apparent on the decree, or to produce relevant matter existing at the time of the decree but discovered afterwards. A bill in the nature of a bill of review, may be exhibited after the decree is entered, and before enrolment. *id.*
4. After a decree has been made by the chancellor, it is not competent for any vice-chancellor to make any order or decree which would directly or indirectly discharge, alter or modify the same. *id.*
5. Held accordingly, where after a decree of foreclosure and sale obtained by default in a mortgage suit before the chancellor; a purchaser, *pendente lite*, of the lands mortgaged, filed a bill before a vice-chancellor, praying for an adjudication that the mortgage never was a lien, or if it were that it belonged to such purchaser, and that the defendant in such suit from whom he bought, had a claim to the lands prior to the mortgage. *id.*
6. Where the bill states a mortgage, apparently valid for the whole sum expressed in it, and then avers that it was given for a smaller sum previously advanced and also to secure future advances, the defendant cannot rely upon one of these averments as an admission in his favor and at the same time exclude the other. *Craig v. Tappin*, 78
7. The complainant was vested with the title to certain real estate, in trust for the benefit of himself and various other persons owing unequal and distinct, but undivided shares therein. He was to employ an agent or substitute to manage and sell the property, and he was not required to act himself further than to execute conveyances, and was to be liable only for gross misconduct or neglect.
 On a bill filed to settle the accounts of the trustee, sell the property, reimburse his advances, and wind up the trust, all the other shareholders were made defendants, together with two persons who had successively been agents or substitutes of the trustee, and whose accounts had never been adjusted. These persons were also original shareholders, and the bill sought to have their accounts settled and closed.
 A demurrer to the bill for multifariousness was overruled. *Kent v. Lee*, 105
8. The bill set forth a sale of exchange at the current rate, for the price of which, a certificate of deposit was given. The suit was for the recovery of the price, and the proof showed that the sale was made for $1\frac{1}{2}$ or $2\frac{1}{2}$ per cent. more than the current rate of exchange. The certificate having been given for the amount at that rate: Held, that that there was no variance between the bill and the proof. *Holford v. Blatchford*, 149
9. It is a fatal objection to a suit, that a part of the complainants do not show any title to participate with the others, in the relief sought. *Cammeyer v. United Lutheran Churches*, 186
10. Where the charter of a corporation, permits its creditors to sue the stockholders "in any court having cognizance thereof,"

- a suit may be commenced in equity. *Masters v. The Rossie Lead Mining Company*, 301
11. Creditors who filed a bill against such a corporation, and thereby obtained a discovery of the names of the stockholders, then exhibited a supplemental bill against the stockholders. *Held*, that the proceeding was proper, and that creditors might sue the corporation and the stockholders conjointly in equity. *id*
 12. A creditor of a corporation may proceed against it by bill, as well as by petition, under the thirty-sixth section of the revised statutes relative to proceedings against corporations in equity. *id*
 13. The usual judgment creditor's bill, is a sufficient form of proceeding under that section; although the party filing it will not thereby obtain any preference over other creditors. *id*
 14. A bill by a mortgagee to foreclose a mortgage against the mortgagor and an adverse claimant of the land, is multifarious. *Banks v. Walker*, 344
 15. A bill to foreclose a mortgage, need not allege an indebtedness for which it was given, and if alleged it need not be proved. *Day v. Perkins*, 359
 16. An averment of the execution of a deed or writing, imports delivery, as well as signing. *Brinckerhoff v. Lawrence*, 400
- PLEADING, II.
- Answers and what proof sustains; Setting up Bankrupt discharge, and Statute of Frauds, and Usury.—Plea.*
17. In an answer in equity, as well as in a plea in a suit at law founded upon a specialty, where the defence is usury, the terms of the agreement, and the quantum or rate of the usurious premium or interest, must be stated specifically; and the proof must come up to the statement in the pleading. *Rowe v. Phillips*, 14
 18. Proof of the plaintiff's admission that he had taken usury, will not support a plea setting forth a particular sum or rate per cent; nor will proof that he exacted a certain rate per cent sustain a plea alleging the taking of a sum in gross which does not correspond with the rate proved. *id*
 19. Where the answer charged that the mortgagees exacted \$112 50 for usury; and the testimony consisted of his admissions, that he had taken usury in the mortgage, also that the mortgagors paid him more than seven per cent, and that they paid him ten or twelve per cent; neither of which rates would produce the sum named; *held* that the proof did not support the answer. *id*
 20. A plea of the statute of limitations, setting up two matters, either of which establishes that defence, is not for that cause a double plea. *Didier v. Davison*, 16
 21. J. residing in the West Indies, in and prior to 1816, became largely indebted to D. & D., merchants in Baltimore. He failed, and went to England, from whence in 1817, he wrote to the D.'s promising to pay when he became able. Subsequently he went to South America and resided there several years. In March, 1834, he came to New York to reside, having sent his family here in the summer of 1833. He declared his intention of becoming a citizen in April, 1834, and he and his family resided here, openly until September, 1835, with the exception of his own temporary absence from March, till July, 1835. In November, 1843, D. commenced a suit in equity in this state against J. to which J. pleaded the lapse of time, setting up as a bar his residence here in 1834 and 1835. *Held*, that the plea was a good bar to the suit. *id*
 22. Amending a plea, defective in form. *id*
 23. Where the defence to a contract stated in a bill, is that it was not in writing, the answer must set up such defence as a fact, and put it in issue distinctly. When the answer admits the making of the agreement alleged in the bill, without asserting that it is not in writing and that it is therefore void by the statute of frauds, the defendant cannot object to the contract on that ground at the hearing. *Vaupell v. Woodward*, 143
 24. Stating in the answer that the contract is void in law and that the defendant is not bound to perform the same, is not sufficient to enable him to avail himself of the statute of frauds, or to put the complainant on proof of a contract in writing. *id*
 25. Where the answer states a contract as a sale and purchase of foreign exchange, without any averment that it was a cover for a loan, or that there was an application for a loan which assumed the form of a sale,

- the defendant cannot prove those facts, or insist upon them, although he has inserted a general allegation that the contract was usurious. *Holford v. Blatchford*, 149
26. In setting up a bankrupt discharge as a defence in an *answer*, it is not necessary to use the same precision, and certainty that is requisite in a *plea*. *McCabe v. Cooney*, 314
27. An answer stating that the defendant made his application, and showing its terms; that he then resided in the district where it was made; that he was a bankrupt within the act of congress, and was owing debts which were not contracted as executor, &c; that upon regular proceedings had in the District Court he was decreed a bankrupt and the decree is still in force; and that upon further regular proceedings, he was discharged from his debts by a decree of the court, and received a certificate; the certificate of discharge being then set out at length; was held to be sufficient as a pleading, to establish the defence *id.*
28. It is not necessary in such an answer, to allege that the complainant's debt was not within the class of debts which are excluded from the operation of the bankrupt law. If the complainant intends to insist that his debt was one of that class, he must state the fact in his bill, as he would any other matter of avoidance. *id.*
- clarations or certificates of trust to sundry persons, by which he acknowledged that each owned an equal share therein, and agreed to hold the land in trust for them, and to exercise a power in trust to sell and dispose thereof for their benefit, and to divide the proceeds amongst them; and if directed by them, to allot, and divide and set apart the land to and among such owners. The validity of the trusts not being questioned, *Held*, that each holder of a certificate had an interest in the covenant and powers contained in the same. That the powers were to be exercised by the declarant personally; and that he could not delegate them, or substitute other persons to execute them in his stead. *Suarez v. Pumpelly*, 336
2. The declarant's economical conduct of the trust, his skill and success in effecting a sale, and his judgment and impartiality in making a partition, were elements of the contract between him and the beneficiaries, and formed a part of the inducement for their purchase of the shares or certificates. *id.*
3. On the trustee's becoming incapable of executing a trust, the court of chancery will carry it into execution in behalf of the parties interested. *id.*
- See WILL, 16.

PRACTICE.

Creditors Suits; Regularity of Proceedings at Law; Duplicity in Plea, and amendment; Contribution; Going in under decree before master; Order on purchaser to complete; Vice-Chancellor directly or indirectly modifying order of Chancellor; Effect on appeal, of irregularity in Court below.

1. The court of chancery does not decide upon the regularity of the proceedings of the supreme court. *Bradford v. Read*, 163
2. Where in a judgment creditor's suit, the defendant put in issue the return of the execution issued out of the supreme court against his property, and the complainant produced at the hearing an execution with a proper return indorsed, which had been filed *nunc pro tunc*, as of a day prior to the commencement of the suit, pursuant to a rule of that court made on a motion without notice after the issue was joined in the creditor's suit, on the ground that the original execution had been lost in its trans-

PLEDGE.

A pledgee may file a bill to obtain a sale of the pledge for the payment of his demand. And although the demand be for unliquidated damages, it is not necessary to assess such damages at law before proceeding in equity for a sale. *Vaupell v. Woodward*, 143

POSSESSION.

See SPECIFIC PERFORMANCE, 8 to 12.

POWER.

See MORTGAGE, 11.
PRINCIPAL AND AGENT, 3 to 9.

POWERS.

1. The owner of land in fee, executed de-

- tion from the sheriff to the clerk; it was held, that the evidence sustained the issue on the part of the complainant. *id.*
3. The circumstance of its being relied on as a defence to the creditor's suit, would be no answer to such a motion in the supreme court, and ought not to interfere with the force of the rule thereupon granted. *id.*
4. The commencement of a suit in chancery by a judgment creditor, whose execution at law has been returned unsatisfied, gives to him an equitable lien upon the things in action of the judgment debtor. *Storm v. Waddell; De Kay v. Waddell,* 494
5. Such was the law of this state before the revised statutes went into operation. *id.*
6. The adjudged cases bearing upon the point, cited and examined. *id.*
7. The lien acquired by the creditor, is defeasible only by a discharge of the debt, or by a successful defence of the suit in some one of the very restricted modes open to the defendant. *id.*
8. The debtor cannot set up in such a suit, any defence to the original demand, on which the judgment was recovered; nor any irregularity in its entry or in the execution; nor that the sheriff refused to levy on property, unless the creditor colluded with him in his misconduct. *id.*
9. A discharge of the debtor, in bankruptcy or insolvency, from his debts, pending the suit, does not operate to discharge or impair the lien acquired by the commencement of such a suit. The suit may proceed *in rem* although the person and the future assets of the debtor may in the mean time be exonerated. *id.*
10. On an order being made for the appointment of a receiver in a judgment creditor's suit, and upon the appointment being completed, the property subject to the order vests in such receiver in equity, as of the date of the order, without the execution of any transfer or assignment. *id.*
11. In regard to movable property liable to execution at law, although it is subject to the lien of the creditor, it may be seized on execution by any other creditor, until the order for a receiver is made, but not afterwards; such order being equivalent to an actual levy on the property. *id.*
12. An assignee in bankruptcy may avoid an assignment executed by the bankrupt in
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- fraud of his creditors, before the passage of the bankrupt law; but if a judgment creditor files a bill to set aside the assignment, before the proceedings in bankruptcy are instituted, and duly prosecutes his suit; he thereby acquires a lien which cannot be divested or impaired by the assignee in bankruptcy. *id.*
13. This was held in a case where the bill was filed, the subpoena to answer served, and the order for a receiver made, before the petition in bankruptcy was presented to the U. S. District Court; although no receiver was appointed until after the debtor was decreed to be a bankrupt. *id.*
14. The fund in controversy being in the custody of the officers of the court, it was ordered to be paid to the complainant in the creditor's suit, in preference to the general assignee in bankruptcy, it appearing that the former was entitled to it. *id.*
15. A plea of the statute of limitations, setting up two matters, either of which establishes that defence, is not for that cause a double plea. *Didier v. Davison,* 61
16. Amending a plea, defective in form. *id.*
17. Where several stockholders were proceeded against in equity, the decree subjected them all to the debt; with leave to apply to enforce contribution among themselves. *Masters v. The Rosie Lead Mining Company,* 301
18. A legatee who goes in before the master, under a decree against an executor for an account obtained by another party, or who makes the result of such accounting the basis of a suit or decree for an account in his own behalf; will be bound by the account taken in such first suit. *Newcomb v. St. Peter's Church,* 636
19. An order upon a purchaser under a decree of foreclosure to complete the sale, made on a specific objection taken to the title; does not decide a question of title or of parties, which was not made the ground of objection, or brought to the consideration of the court. And such order is not a protection to the purchaser, against persons having vested interests in the equity of redemption; who ought to have been, but were not, made parties to the foreclosure. *Williamson v. Field,* 533
20. Chancery will not compel a purchaser in good faith under its decree, to take a defective title, where the defect is brought to

its notice ; but it does not undertake that none but good titles shall be sold under its directions. *id.*

21. After a decree has been made by the chancellor, it is not competent for any vice-chancellor to make any order or decree which would directly or indirectly discharge, alter or modify the same. *The Greenwich Bank v. Loomis*, 70

22. Held accordingly where after a decree of foreclosure and sale obtained by default in a mortgage suit before the chancellor ; a purchaser, *pendente lite*, of the lands mortgaged, filed a bill before a vice-chancellor, praying for an adjudication that the mortgage never was a lien, or if it were that it belonged to such purchaser, and that the defendant in such suit from whom he bought, had a claim to the lands prior to the mortgage. *id.*

23. Where on an appeal, the decree below appears to have been made on "the cause being brought to a hearing on the pleadings therein, upon a motion to dissolve the injunction issued in the cause," after a replication has been filed, and it also appears that there were no proofs ; the appellate court will presume that the hearing below was regular, by consent or otherwise, and that the decree was made in due form. If it were irregular, the party complaining should move for redress in the court below. *Taylor v. Carpenter*, 603

See *LIS PENDENS*.
MORTGAGE, 63, 64, 69 to 78.
RECEIVER.

PRE-EMPTION.

- A settler on lands of the United States, entitled to pre-emption, has no title or estate in the land, which he can sell or incumber. He has simply a right to become the purchaser at the minimum price of the public lands, in preference to all others ; and the right is forfeited, if when the land is offered for sale, he is unable or unwilling to pay that price. *Craig v. Tappin*, 78

PREFERENCE.

See *CORPORATION*, 26 to 31.

PRINCIPAL AND AGENT.

1. Where an agent purchases land in his own name upon the request and for the

benefit of his principal, pays part of the consideration, and gives his mortgage for the residue, with a bond in which his constituent joins ; the agent is a surety for his constituent in respect of such bond ; and equity will decree that he be paid his advance and indemnified against the bond and mortgage, on his conveying the title to the principal. *The Mohawk and Hudson Rail Road Company v. Costigan*, 306

2. It is competent to prove by parol evidence that in such a purchase, the party receiving the deed and executing the mortgage, is a surety in respect of the latter. *id.*

3. A solicitor or agent who is employed to procure the assignment of a bond and mortgage, or to invest money upon such securities, is not thereby authorized to receive either the principal or interest, when his client or constituent takes and retains the possession of the securities. *Williams v. Walker*, (325) 225

4. When in such cases, the solicitor or agent is expressly authorized to collect the interest, the debtor is not warranted in inferring that he is authorized to receive the principal debt. *id.*

5. The debtor is authorized to infer, that the solicitor or agent is empowered to receive both interest and principal, from his having possession of the bond and mortgage. *id.*

6. So if he have the possession of the bond, without either the mortgage or the assignment. *id.*

7. But such inference being founded upon the custody of the securities, ceases whenever they are withdrawn by the creditor ; and it is incumbent upon the debtor who makes payments to the solicitor or agent, relying upon such inference, to show that the securities were in his possession, on each occasion when the payments were made. *id.*

8. The authority thus implied from the possession of the securities, is not limited to a receipt of the whole principal in one sum. It is like the authority of an attorney employed to collect a debt, who may exercise a discretion as to receiving it in partial payments. *id.*

9. Where a solicitor who had effected a loan on bond and mortgage, received a part of the principal debt while he had the possession of the securities, and subsequently received the whole debt after they had been withdrawn from him, but never paid to the

lender any part of the principal, though he continued to pay her interest on the entire sum, as if it were collected from time to time on the bond and mortgage; it was held that the payments of principal received by him while he held the securities were valid, and that those paid afterwards did not impair the bond and mortgage. And that the mortgagor was not entitled to be credited towards the debt, the interest which the solicitor paid out of his own funds to the lender previous to the discovery of his fraud, upon that portion of the principal which was discharged by the payments held to be valid. *id.*

See POWERS.

PRINCIPAL AND SURETY.

1. Where a surety took a confession of judgment for his indemnity from the maker of two notes which he had undersigned, sold the maker's property on an execution thereon, and received the proceeds in the promissory notes of the purchasers of such property; *Held*, that he was in equity a trustee of the last mentioned notes for the holder of the obligations upon which he was surety. *Clark v. Ely*, 166
2. And that on his transferring such notes, in payment of a precedent debt of his own, or as security for such a debt, the transferee could not retain them as against the prior equity of the principal creditor, on the faith of whose debt they had been realized. The latter has the prior and superior equity, and it must prevail over the legal title. *id.*
3. This was held in the case of a bank, which discounted the trust notes, and applied the proceeds on a subsisting indebtedness, but without relinquishing any security or property. And also in respect of a judgment and execution creditor, who received such notes in payment, without notice of the trust; but who did not discharge his judgment or execution, or prove that he relinquished any lien or security in the transaction. *id.*
4. Where such a trustee was entitled to a part of the securities for his own benefit, on the beneficiary tracing a portion less than his own to the hands of third persons, the trustee having nothing left in his hands; such third persons cannot assume that the portion in their possession was that belonging to the trustee. They stand in this respect in the same position toward the beneficiary as the trustee himself. *id.*

5. The holder of negotiable bills or notes received as security or indemnity, or as payment for a previous liability or indebtedness, without relinquishing any valid security or lien; is not protected against the true owner either in law or equity; although the same were taken in entire good faith. *id.*

6. The New York cases on this subject commented upon. *id.*

7. Where a creditor of N. holds as his security, for a specific debt, a mortgage of N. against H., which by an agreement between themselves, N. is bound to discharge; and N. makes a payment to his creditor on the specific debt; such payment enures to the benefit of H. in respect of the mortgage, and the creditor cannot retain H.'s mortgage by subsequently making an application of the payment on other debts due to him from N. By force of the agreement, the payment made by N. operates as a discharge of so much of H.'s mortgage. *The N. Y. Life Insurance and Trust Company v. Howard*, 183

8. N. absconded, and the creditor obtained some security from him, though far less than his other debts. H. is not entitled to participate in the benefit of such security to reduce his mortgage. *id.*

9. The principle of the rule, that where a person becomes a surety in a note to be used for a particular object, the principal cannot divert it from that object without the surety's assent; applied as between the principal's administrator and the surety, in favor of the latter, to the proceeds of such a note remaining in the principal's hand at his death. *Lee v. The Highland Bank*, 311

10. The administrator's claim to retain the proceeds is no better than that of the intestate would have been if he had been living. *id.*

11. Where one purchases land which is subject to a bond and mortgage, executed by his grantor, and in his deed assumes and agrees to pay the mortgage; he is liable to his grantor to pay the same as a part of the price or consideration of the land.

As between him and the mortgagor, the latter thereupon becomes a surety for the former, in respect of the mortgage debt. *Blyer v. Monholland*, 478

See PRINCIPAL AND AGENT, 1, 2.

PRIOR EQUITY.

See PRINCIPAL AND SURETY, 1 to 6.

PROMISSORY NOTE.

See PRINCIPAL AND SURETY, 11, 12.

PUBLIC ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS, 5 to 7.

PUBLIC LANDS.

See PRE-EMPTION.

PUBLIC TRUSTS.

See CHARITABLE USES, 1 to 8.

PURCHASER.

See BONA FIDE PURCHASER, 1 to 6.
DECREE, 6 to 8.
LIS PENDENS.
MORTGAGE, 69 to 74.
SPECIFIC PERFORMANCE, 8 to 12.

R**RAIL ROAD COMPANY.**

See CORPORATIONS, 14 to 25.

REAL ASSETS.

See JURISDICTION, 8 to 12.

REAL ESTATE.

See MORTGAGE, 21 to 25.
PARTNERSHIP, 10 to 13.

RECEIVER.

1. An order for a receiver, when his appointment is completed, vests in him, in equity, all the property and effects subject to the order, without any assignment. *Mann, Receiver, &c. v. Pentz*, 257
2. In respect of the receiver's exercise of his powers in courts of law, an assignment to

him by the party is proper, and as to the legal title to real estate, it is indispensable. But in equity, although usual in our practice, it is unimportant; and in England it is not practised. *id.*

3. On an order being made for the appointment of a receiver in a judgment creditor's suit, and upon the appointment being completed, the property subject to the order vests in such receiver in equity, as of the date of the order, without the execution of any transfer or assignment. *Storm v. Waddell*; *De Kay v. Waddell*, 494
4. In regard to movable property liable to execution at law, although it is subject to the lien of the creditor, it may be seized on execution by any other creditor, until the order for a receiver is made, but not afterwards; such order being equivalent to an actual levy on the property. *id.*

See CORPORATIONS, 14 to 25.

RECORDING ACTS.

See MORTGAGE, 17 to 19.

RELIGIOUS CORPORATIONS AND SOCIETIES.

See CHARITABLE USES.
CORPORATIONS, 6 to 13.

REMAINDERS.

1. When the person to whom a remainder after a life estate is limited, is ascertained and the event upon which it is to take effect is certain to happen; it is a vested remainder, although by its terms it may be entirely defeated by the death of such person before the termination of the particular estate. *Williamson v. Field*, 533
2. It is the uncertainty of the right of enjoyment, which renders a remainder contingent; not the uncertainty of its actual enjoyment. *id.*
3. The present capacity of taking effect in possession, if the possession were to become vacant, distinguishes a vested from a contingent remainder; not the certainty that the possession ever will become vacant while the remainder continues. *id.*
4. A testatrix devised real estate to three trustees in fee, in trust to receive the rents,

issues and profits thereof, and pay the same to her grandson during his natural life; and from and after his death, in further trust to convey the same to his lawful issue living at his death in fee; and if he should not leave any lawful issue at the time of his death, then in further trust to convey the same to another grandson of the testatrix in fee, or to such person in fee as he might by will appoint, if he died prior to the tenant for life: *Held*, that the children of the tenant for life, (all of whom were born after the death of the testatrix,) took vested equitable remainders in fee in the real estate, as they were born respectively; which remainders were liable to be divested as to each on his or her dying during the lifetime of their father, and were subject to open to let in the after born children of the tenant for life. *id.*

5. Under such a devise, no conveyance of the legal title by the trustees is now necessary in order to vest the whole estate in the children at the determination of the particular estate. *id.*

RENTS.

See LANDLORD AND TENANT.

RES-ADJUDICATA.

See ASSESSMENTS.
DECREE, 1 to 5.
PRACTICE, 18, 19.

RESCINDING AGREEMENT.

See BANKING ASSOCIATIONS.

RESULTING TRUST.

See TRUSTS, II.

REVIEW, BILL OF.

See PLEADING, 1 to 5.

REVISED STATUTES.

Relative to CREDITORS SUITS, *see* DEBTOR AND CREDITOR, II.
" " LIMITATIONS, *see* LIMITATIONS.
" " PROCEEDINGS AGAINST CORPORATIONS, *see* CORPORATIONS, 14 to 34.

Relative to SET OFF AGAINST ADMINISTRATORS, *see* EXECUTORS AND ADMINISTRATORS, 9, 10.
" " USES AND TRUSTS, *see* TRUSTS, III.

S

SALE.

1. On a sale of shares of stock in an incorporated company, deliverable at a future day, it is not necessary that the vendor, in order to recover damages on the refusal of the buyer to receive the stock, should immediately make a re-sale of the stock and an actual transfer of the same. *Vaupell v. Woodward*, 143
2. On such a sale, no tender of the stock is necessary in equity, when the purchaser, on the day it is to be completed, avows that he will not receive it. *id.*
3. Railway shares not within the English statute of frauds against parol contracts—*in note.* *id.*
4. Foreign exchange is a commodity which is bought and sold, like merchandize. The thing sold by the drawer of a foreign bill, is his money or funds abroad, or, what to the payee is equivalent, his credit abroad, equal to cash. The bill of exchange is the instrument of transfer. *Holford v. Blatchford*, 149
5. From the nature of foreign bills, their sale by the drawer and their transfer by the payee, usually precede acceptance. And whether the contract for the sale of such a bill, be deemed an agreement to draw the bill, or one in respect of the bill already drawn; it is equally the sale of an existing thing in action, and legal. *id.*
6. Such a contract stands upon a different footing from one for the sale of promissory notes and inland bills of exchange previous to their being issued or put in circulation. Notes and inland bills are not the subject of sale, except when held by one who can maintain a suit upon them against the other parties at maturity. *id.*
7. Bankers checks and drafts, or inland bills at sight, are in this respect, similar to foreign bills of exchange. *id.*
8. A bill drawn by a house in New York on a house in London, the partners in both

houses being the same persons, is the legitimate subject of sale in the hands of the drawers. *id.*

9. An offer to sell land at a fixed price, without more, is an offer to sell for cash. *Cam-meyer v. The United Lutheran Churches*, 186

10. The acceptance of such an offer, to bind the seller, must be simple, and without the addition of any new term or qualifications. *id.*

See FRAUDS, STATUTE OF.
PLEADING, 8, 25.
SPECIFIC PERFORMANCE, 6, 7, 13 to 16.

SATISFACTION.

See MORTGAGE, VIII.

SECURITIES.

The word "securities," in the proviso in the late bankrupt law, is used in its popular sense, and includes every interest or right attached to, or which is a charge upon, specific property, or which entitles the owner of such right or interest to be paid out of specific property; whether the right be legal or equitable, absolute or contingent. *Storm v. Waddell; De Kay v. Waddell*, 494

See MORTGAGE, 17 to 19, 31 to 35.

SEPARATE ESTATE.

See MARRIAGE SETTLEMENT.

SET OFF.

See EXECUTORS AND ADMINISTRATORS, 9, 10.

SETTLEMENT.

See MARRIAGE SETTLEMENT.

SHARES.

See CORPORATIONS, 20 to 31.
SALE, 1 to 3.

SHERIFFS.

See DEBTOR AND CREDITOR, 2 to 7.

SOLICITOR.

See MORTGAGE, 2 to 4.
PRINCIPAL AND AGENT, 3 to 9.

SPECIFIC PERFORMANCE.

1. The complainants purchased of T. distinct portions in severalty, of a lot of land, by contracts, providing for their conveyance, at a future day. T. was in possession under a like contract from the defendant, who was seized of the land. Another contract had been given by the defendant to M. and he refused to convey to the complainants, except subject thereto. Thereupon one of them, W., in behalf of the whole, and for their protection bought M.'s contract. The defendant then ejected the complainants severally, and they exhibited their bill against him praying for an injunction and a conveyance of the land to W. for their benefit. *Held*, on demurrer, that there was no misjoinder of complainants, but that T. was a necessary party to the suit. *Wood v. Perry*, 7
2. A parol agreement, to leave lands to a person by will, though founded on a precedent valuable consideration, cannot be enforced in equity. *Harder v. Harder*, 17
3. A resulting trust may be proved against persons claiming by descent, by parol admissions of the ancestor. *id.*
4. The intestate, in 1802, bought a farm, which was conveyed to him in fee, he giving a mortgage for the purchase money. He resided upon it until his death in 1835; but it was paid for out of the labor and earnings of his four younger sons. *Held*, that such payment raised a resulting trust in their favor, and that they were entitled to the farm in equity. *id.*
5. The youngest son, R. being the owner of ten acres of land, the intestate agreed with him by parol, that if he would convey the same to his three brothers, he should have a small farm which the intestate owned in another town. R. conveyed the ten acres accordingly, went into possession of the small farm, and made permanent improvements upon it; *Held*, that the agreement was so far performed as to bind the intestate and his heirs. *id.*
6. The court of chancery does not interfere, by way of decreeing specific or farther performance, with executed agreements. *Tucker v. Clarke*, 96

7. Where parties supposing that they were seised, sold and conveyed lands, with covenants of seisin and warranty, to which as it subsequently appeared, they had no title; and six years afterwards, on being sued by their grantee on the covenant of seisin, purchased the lands of the true owners, and tendered a new conveyance thereof to the grantee, who refused to accept it;
Held, that the court had no power to compel the grantee to receive the deed, or to interfere with his action on the covenants of title. *id.*
8. Where payment is to be made on the conveyance of land at a stipulated period, and the land is not then conveyed, the purchaser is not in default if he omits to pay the price, and no interest is recoverable against him until he is put in default by the tender of a deed. *Stevenson v. Maxwell*, 273
9. The general rule in England is, that from the time fixed for the completion of a contract for the sale and conveyance of land, the purchaser is entitled to the profits of the estate, and will be compelled to pay interest upon the price. And the agreement to pay interest, is implied from the purchaser's receiving, or being entitled to receive, the rents and profits. *id.*
10. This rule is modified here, by the difference in the situation and productiveness of real estate, and the higher rate of interest; and in the case of vacant or unproductive property, a contract to pay interest will not be implied, when the purchaser is prevented from obtaining his title through the default or negligence of the vendor. The entry into possession of such property ought not to affect the principle. *id.*
11. And where the purchaser does not go into possession, under or in pursuance of the contract of sale, and the delay in its completion is imputable to the seller, he will not be charged with interest on the purchase money, in the absence of an express agreement to pay interest. *id.*
12. S. & M. being joint owners in possession of several lots, under a lease which contained a covenant for a sale and conveyance to the lessees at their option at a fixed price, tendered the price to the lessor's heirs and representatives, and demanded the title; but the latter, by reason of infancy and other causes, were unable for a long period to convey the same. S. then signed an agreement by which he covenanted to execute a perfect conveyance to M. of all his right and interest in one of the lots, (which was vacant,) on the 1st of May, 1830, in consideration of a large price to be then paid or secured by M.; and when the legal title was obtained, he would give any further assurance, &c. S. made no effort to complete, or to convey his own interest to M. at or before the day fixed; and early in 1831, he repudiated the agreement, denied its obligation, and disclaimed M. as being the purchaser. M. nevertheless proceeded, and erected a valuable store on the lot, the income from which exceeded the whole cost of both store and lot; and at the same time he made similar erections on the joint account, on the other lots of himself and S. In 1836, S. filed a bill, amongst other things, calling on M. to complete the purchase of the lot, and a conveyance was finally in readiness for M. in 1841.
Held, that M. did not enter into possession under his contract with S., and the character of his previous possession was not changed. That S. was not entitled to interest on the stipulated price from May 1, 1830, nor until he made or offered a full conveyance of his right and title in the lot; but he was entitled to the value of the rents in the intervening period as the same would have been derived from the lot, in the condition in which it was when he contracted to sell to M. *id.*
13. To induce equity to decree the specific performance of an agreement, it must be free from fraud, surprise or misrepresentation. *Best v. Stow*, 298
14. A misrepresentation made by the vendor in a matter of substance, affecting the value of the estate sold, is a good defence to a suit for specific performance, although the vendor as well as the vendee, was ignorant of its untruth. *id.*
15. This was held of an erroneous statement that land in a distant state, was situated in a particular county, in which the purchaser desired to buy. *id.*
16. The defendant, in a suit for specific performance, may show in his defence, by parol evidence, that the written contract relied upon, does not correctly and truly express the agreement of the parties, but that there is some material omission, insertion or variation, through mistake, surprise or fraud. *id.*

See PARTNERSHIP, 10 to 12.

STATUTE.

See LIMITATIONS.

STATUTE OF FRAUDS.

See DEBTOR AND CREDITOR, I.
FRAUDS, STATUTE OF.
SPECIFIC PERFORMANCE, 2 to 5.

STATUTE OF LIMITATIONS.

See LIMITATIONS.

STIPULATION.

See MORTGAGE, 38.

STOCKS AND STOCKHOLDERS.

Where stocks loaned, are to be returned at a fixed time, the measure of damages on a default, is the market price of the stocks at that time. (*Quere.* See note at the end of the case.) *Day v. Perkins*, 359

See CORPORATION, 20 to 31.
SALE, 1 to 3.

SUBROGATION.

See MORTGAGE, 39 to 41.

SUBSTITUTION.

See MORTGAGE, 39 to 41.

SUCCESSION.

See EXECUTORS AND ADMINISTRATORS, 1 to 4.
PERSONAL SUCCESSION.

SUPPLEMENTAL BILL.

See PLEADING, 10, 11.

SUPPORT.

See HUSBAND AND WIFE, 2.

SURETY.

See PRINCIPAL AND SURETY.

SUSPENDING POWER OF ALIENATION AND ABSOLUTE OWNERSHIP.

See WILL, III.

T.

TENDER.

See SALE, 2.

TIME OF VESTING.

See WILL, 30, 36 to 45.

TITLE.

See MORTGAGE, 21 to 25.

TRADE MARKS.

1. No person has a right to use the names, marks, letters, or other symbols, which another has previously got up or been accustomed to use, in his trade, business or manufactures. *Coats v. Holbrook*, 586
2. Equity will restrain such deceptive and fraudulent use of trade marks, by injunction, and will decree an account for damages. *id.*
3. It is no answer to the suit, that the simulated article is equal in quality to the genuine manufacture. *id.*
4. Nor that the maker of the spurious goods, or the jobber who sells them to the retailers, informs those who purchase, that the article is spurious or an imitation. *id.*
5. A commission merchant who sells the spurious article, knowing its character, is liable to a suit to restrain its further sale by the proprietor of the trade mark, and will be subjected to the costs of such suit. *id.*
6. The alienage of the person whose trade marks are simulated, and his residence in a foreign country, do not affect his right to their exclusive use, when he has introduced them here. *id.*
7. There is no difference between citizens and aliens, in respect of their rights in trade marks, or their claim to have such rights protected in our courts. *Taylor v. Carpenter*, 603

8. The court of chancery will grant an injunction against the unauthorized use of a manufacturer's or vendor's trade marks, and will decree the payment of the damages sustained thereby. *id.*
9. Where one intentionally uses or closely imitates another's trade marks, on merchandise or manufactures, the law presumes it to have been done for the fraudulent purposes of inducing the public, or those dealing in the article, to believe that the goods are those made or sold by the latter, and of supplanting him in the good will of his trade or business. *id.*
10. And in such a case, it is wholly immaterial whether the simulated article is, or is not, of equal goodness and value with the genuine manufacture. *id.*
11. The right thus protected does not partake of the nature and character of a patent or copy-right. Per Spencer, Senator. *id.*
12. The defendant who is found to have pirated trade marks, must pay the costs of suit. *id.*
13. The vendors of an article of trade or manufacture, who have established or become entitled to a particular trade mark which they use, to distinguish such article, are entitled to be protected in its use, although they do not manufacture the goods. Per Lott, Senator, and so adjudged. *id.*
14. The protection of trade marks is among the highest incentives to ingenuity, exertion and fidelity, and one of the greatest securities to the public against imposition. Per Spencer, Senator. *id.*
15. In a suit to restrain the use of trade marks alleged to be simulated, if it appear that the marks used by the defendants, though resembling the complainant's in some respects, would not probably deceive the ordinary mass of purchasers, paying the attention which such persons usually do in buying the article in question; an injunction will not be granted. *Partridge v. Menck*, 622
16. An imitation is colorable and will be enjoined, which requires a careful inspection, to distinguish its marks and appearance, from those of the manufacture imitated. *id.*
17. In these cases, the question is not whether the complainant was the original inventor or proprietor of the article made by him and upon which he now puts his

trade mark; nor whether the article made and sold under his trade mark by the defendant, is equal to his own in quality or value. But the court proceeds on the ground, that the complainant has a valuable interest in the good will of his trade or business; and having appropriated to himself a particular label, sign or trade mark, indicating to his customers, that the article is made or sold by him or by his authority, or that he carries on business at a particular place; he is entitled to protection against one who attempts to pirate upon the good will of his friends or customers or the patrons of his trade or business, by using such label, sign or trade marks, without his consent or authority. *id.*

18. Where the case is one of doubt in respect of the alleged piracy, the court should not grant or retain an injunction until the cause is heard on pleadings and proofs, or until the complainant has established his right by an action at law. *id.*

19. On a bill filed to restrain the defendant from selling a work alleged to be a fraudulent imitation of the complainant's publication; held, it not being entirely clear that the complainant had a legal right; and the defendant undertaking to keep an account; that the injunction ought not to be retained. *Spottiswoode v. Clark*, 623

TRUSTEES.

See CORPORATIONS, 6 to 13.
TRUSTS.

TRUSTS.

- I. *Of the nature and incidents of trusts in general.*
- II. *Of implied or resulting trusts.*
- III. *Of the trust estate; and herein of the construction of trusts, and of their validity in respect of the revised statutes.*
- IV. *Of Trustees and Beneficiary; including the power, duty and liability of trustees; their accounting and allowances; the disposition of the trust fund; and suits against the beneficiaries.*

TRUSTS, I.

Of the nature and incidents of trusts in general.

1. The provision in the revised statutes, that when the purposes for which an express trust shall have been created, shall have ceased,

- the estate of the trustees shall also cease; applies to trusts created before those statutes took effect. *Bellinger v. Shafer*, 293
2. So of the provision that persons who by any grant are entitled to the actual possession and the receipt of the rents and profits of lands, in law or in equity, shall be deemed to have a legal estate therein commensurate with their beneficial interest, where no power of disposition or management over the same remains in trustees. *id.*
 3. Under a devise to trustees, in trust to receive the rents and profits, and pay the same to one for life, and after his death to convey the estate to his issue then living; since the revised statutes no conveyance of the legal title by the trustees is necessary in order to vest the whole estate in the children at the determination of the particular estate. *Williamson v. Field*, 533
 4. The owner of land in fee, executed declarations or certificates of trust to sundry persons, by which he acknowledged that each owned an equal share therein, and agreed to hold the land in trust for them, and to exercise a power in trust to sell and dispose thereof for their benefit, and to divide the proceeds amongst them; and if directed by them, to allot, and divide and set apart the land to and among such owners. The validity of the trusts not being questioned, *Held*, that each holder of a certificate had an interest in the covenant and powers contained in the same. That the powers were to be exercised by the declarant personally; and that he could not delegate them, or substitute other persons to execute them in his stead. *Suarez v. Pumpelly*, 336
 5. The declarant's economical conduct of the trust, his skill and success in effecting a sale, and his judgment and impartiality in making a partition, were elements of the contract between him and the beneficiaries, and formed a part of the inducement for their purchase of the shares or certificates. *id.*
 6. On the trustee's becoming incapable of executing a trust, the court of chancery will carry it into execution in behalf of the parties interested. *id.*
 7. A bequest for the benefit of poor ministers of a specified religious denomination, is valid, though it does not appoint the trustees of the fund. And it is competent for the testator to empower the executors and trustees of his will to designate the first trustees of such fund. If it were otherwise, the trust would remain and the court of chancery would appoint the trustees. *Shotwell, Executor, &c. v. Mott*, 46
 8. The case of *Darling v. Rogers*, (22 Wend. 483,) commented upon. It does not sustain an assignment in part, where there is a corrupt intent apparent as to some other part of the instrument or of the property therein contained; but holds that if it contain a trust unauthorized by law, inserted without any corrupt motive, such trust is not evidence of fraud, and therefore does not avoid the other portions of the instrument. *Goodhue v. Berrien*, 630
- TRUSTS, II.
- Of implied or resulting trusts.*
9. A resulting trust may be proved against persons claiming by descent, by parol admissions of the ancestor. *Harder v. Harder*, 17
 10. The intestate, in 1802, bought a farm, which was conveyed to him in fee, he giving a mortgage for the purchase money. He resided upon it until his death in 1835; but it was paid for out of the labor and earnings of his four younger sons. *Held*, that such payment raised a resulting trust in their favor, and that they were entitled to the farm in equity. *id.*
 11. The youngest son, R. being the owner of ten acres of land, the intestate agreed with him by parol that if he would convey the same to his three brothers, he should have a small farm which the intestate owned in another town. R. conveyed the ten acres accordingly, went into possession of the small farm, and made permanent improvements upon it: *Held*, that the agreement was so far performed as to bind the intestate and his heirs. *id.*
- TRUSTS, III.
- Of the trust estate; and herein of the construction of trusts, and of their validity in respect of the revised statutes.*
12. A bequest for the use of the poor of a town, and one to an unincorporated religious association for the use of its poor ministers, are not within the provisions of the statutes against perpetuities. *Shotwell, Executor, &c. v. Mott*, 46
 13. Where a testator directed his executors

- to sell his lands and to distribute the proceeds amongst various persons together with sundry charitable institutions; it was *held* that there was a conversion of the real estate and the gifts were to be treated as legacies. *id.*
14. It was also held, that if they were to be deemed land, they were nevertheless valid, because the revised statutes relative to Uses and Trusts, do not apply to Charitable Uses. *id.*
15. The revised statutes against perpetuities and regulating uses and trusts, were aimed at private trusts and accumulations for remote posterity. Public trusts and charitable uses were not within the intention of the legislature, or the spirit and object of the enactment. *id.*
16. The English statute of Uses, 27 Henry VIII., did not apply to public uses or charities. *id.*
17. Charitable uses were bestowed in England, and were recognized by law, before the Norman conquest; and they were always fostered and protected by the common law. They were subject to the jurisdiction of the court of chancery long before the statute of Charitable Uses, 43d Elizabeth; and this, whether the trustees were a corporation or individuals, and whether the gift were to trustees by name, or for a definite and specific object without naming trustees. *id.*
18. A bequest for the ministers of the New York Yearly Meeting of Friends called Orthodox, who are in limited and straitened circumstances, is not too vague or uncertain, or too indefinite in its objects. *id.*
19. So of a bequest for the relief of such indigent residents of the town of Flushing, as the trustee or trustees of the town for the time being should select. *id.*
20. S. and his wife conveyed a farm to trustees, *habendum* to them and their heirs and assigns, for the support, maintenance and education of three grandsons and four granddaughters of the grantors, until the latter respectively arrived at full age, unless they sooner married, on which the use and objects of the trust as to them should cease; and to the further use and behoof in fee simple to the three grandsons; with a power of sale to the trustees in the meantime. *Held*, that the trust continued for the benefit of the whole seven, until all the granddaughters were married or of full age; upon which event the interest of the latter ceased, and the objects of the trust ceased also, together with the power conferred on the trustees; and the three grandsons thereupon became seized of an absolute legal estate in fee. *Bellinger v. Shafer*, 273
21. A testatrix devised real estate to three trustees in fee, in trust to receive the rents, issues and profits thereof, and pay the same to her grandson during his natural life; and from and after his death, in further trust to convey the same to his lawful issue living at his death in fee; and if he should not leave any lawful issue at the time of his death, then in further trust to convey the same to another grandson of the testatrix in fee, or to such person in fee as he might by will appoint, if he died prior to the tenant for life: *Held*, that the children of the tenant for life, (all of whom were born after the death of the testatrix,) took vested equitable remainders in fee in the real estate, as they were born respectively; which remainders were liable to be divested as to each on his or her dying during the lifetime of their father, and were subject to open to let in the after born children of the tenant for life. *Williamson v. Field*, 533
22. A testator gave to his wife for life all the income, rents and profits of his real and personal estate; and after her death gave the like interest to T. for life, out of which she was to support three infants, W.; J. and E. Next, he gave the whole rents and income after her death, to W., J. and E. for life, as joint tenants; and then gave the residue of his estate to E. absolutely and in fee, first providing for her fifty thousand dollars when she should arrive at age. Then followed a provision that if E. should die without children or issue, that the whole residue of his estate should go to his cousins. In a suit by one of the next of kin, in which a construction of the will as to the personal estate became requisite; *Held*, 1. That the two first life estates in the income and profits, were valid. 2. That the subsequent gifts of the personal estate were void as suspending the absolute ownership more than two lives in being at the death of the testator. 3. That the legacy of fifty thousand dollars to E. was contingent on her attaining her full age, and was void for the same cause. 4. That T. was not entitled to enjoy the personal property for life, in specie; but that it must be converted and permanently secured, so as to give her the income, and

preserve the capital for the next of kin. *Emmons v. Cairns*, 369

23. A testator having three sons and four daughters living, and six grandchildren the issue of a deceased daughter and of her husband, G., by his will gave to three of his daughters each one-fourth of his real and personal estate absolutely, and another fourth to G. and his children; and then devised and bequeathed the remaining half of his estate to his executors, in trust to rent, invest and improve the same, and receive and collect the rents and income, and out of the income, to pay yearly annuities, (unequal in amount, but each considerably less than one-eighth of the income,) to each of his three sons, J., H. and M. and to his daughter H. A. The latter was to cease on her surviving her husband, and she was then to take one-fourth of the half absolutely; and if her husband survived her, her annuity was to continue to him for life, and the eighth of the estate subject to that annuity, was to vest in her issue by representation. On the death of the sons J. or H. leaving a widow, she was to have the annuity of her husband, during her life. The trustees were clothed with a discretionary power to increase the annuities of the respective sons, and the daughter H. A., during their lives. If the net income of the trust fund exceeded the annuities, the surplus as to three-fourths accruing after a month from the testator's death, was to accumulate equally for the benefit of the issue of J. H. and H. A. respectively during their minorities, and to be paid to them respectively at twenty-one. So long as either of those three were without issue, the surplus of the income of their trust shares, after satisfying the annuities to them or the husband or widows, as the case might be; was to be paid to the three other daughters, and to the issue of H. A., to G., and to the issue of H. and J., if either had any; all taking *per stirpes*. On the death of M., who it was supposed would never have issue, the testator gave one-fourth of the trust fund, to the same devisees as last above expressed; and the surplus income of that fourth while he lived, was to go to the same persons and classes.

On the death of J. and H. respectively, other two fourth parts of the trust fund were given to their respective issue, subject to the respective annuities to their widows. But if either of those sons left no issue, the respective fourth parts, subject to the widows annuities, were given to the three daughters first named, to G. or his issue, to H. A. or her issue, and to the issue of either

J. or H. if any there were; all bestowed *per stirpes*.

Held, on the construction of the will, that the devise in trust of the half of the estate, was to be construed and taken as a devise of separate and distinct shares, each consisting of one-fourth part of such half, on distinct trusts in respect of each; and that the power of alienation was not suspended as to any portion of the estate, beyond two specified lives in being at the death of the testator; and that there was no absolute suspension for a month, or for any designated period. *Mason v. Mason's Executors*, 432

24. The annuities to the two sons and the daughter, are not a joint charge upon the three-fourths of the trust fund; but each is a separate charge on the respective fourth parts given in trust. *id.*

25. *Held also*, that the trusts for the accumulation of the surplus income of the respective shares were valid. As to all the beneficiaries, the accumulations were to commence within two lives in being at the death of the testator; during the minority of the respective beneficiaries; and were to terminate as to each when he became of age. *id.*

26. It is a sufficient compliance with the provisions of the revised statutes as to such accumulations, if the persons for whom the same are intended, are designated or described as a class, *e. g.* as the children of a person named. *id.*

27. Where such a class is designated, it is not essential that all should be living when the accumulation commences; provided at the commencement it goes for the benefit of such as are in *esse* exclusively, and that those who subsequently become entitled fall within the prescribed rules laid down by the statute. *id.*

28. Such a succession of accumulations, is not objectionable, if they are all made to terminate within the prescribed limits as to time in respect of the suspension of the power of alienation. *id.*

29. *Held also*, that a devise in trust for the payment of annuities out of the income of real estate, is valid. *id.*

See TAYLOR, 3.

TRUSTS, IV.

Of Trustees and Beneficiary; including the power, duty and liability of trustees; their accounting and allowances; the disposition of the trust fund; and suits against the beneficiaries.

30. Where there is a devise and bequest to trustees, one of whom is to take a beneficial interest in the trust property, he takes a legal estate to the extent of such interest. *Mason v. Mason's Executors*, 432

31. The father of the beneficiaries, with the trustees consent, made permanent improvements on the farm, conveyed to the latter in trust, while their tenant; the trust containing no authority for the same, *held* that no allowance could be made for such improvements, as against the beneficiaries and those claiming under them. *Bellinger v. Shafer*, 273

32. It was also held, that the trustees had no lien upon the farm after their estate in it ceased, for any unpaid commissions or charges. *id.*

33. Where a resident of another state owning lands here, conveyed them to a trustee residing here, in trust to sell the same, and out of the proceeds, after paying certain specific sums, to remit the balance to a person residing at the grantor's domicile, to be by him applied rateably upon all the debts of the grantor; and the grantor died insolvent, owing debts at his domicile and in other more distant states, and leaving executors who qualified at his domicile; it was *held*, that any of his creditors might file a bill in this state, in behalf of themselves and all other creditors, against the trustee, the distributor of the fund, and the executors of the grantor; to have the lands sold, the accounts of the trustee taken, and the fund distributed to the creditors. *Slatter v. Carroll*, 573

34. The trust fund being real estate situated here, and the trustee a resident of this state, the jurisdiction of our court of chancery is unquestionable. *id.*

35. And where there are real assets, the court will not hesitate to administer them, although no personal representative has been appointed here. *id.*

36. The rule of distribution, must be that of the trust deed, when that is not repugnant to the laws of this state. *id.*

37. The court will direct the fund to be remitted, pursuant to the deed of trust, to the person therein designated, for distribution; or will retain it and distribute it here, according to the circumstances of the case, in reference to the convenience of creditors and of the accounting parties. *id.*

38. As a general rule, cestuis que trust must be made parties, where the equity of redemption is vested in a trustee for their benefit. But where there are remote trust limitations, it suffices to bring before the court the beneficiaries *in esse*, who have the first estate of inheritance, together with those having the precedent estates and prior interests, and the trustee. *Williamson v. Field*, 533

39. In a suit to foreclose the equity of redemption in lands mortgaged and to sell the lands, all persons having an interest in the equity of redemption should be made parties. *id.*

40. This was held of persons having a vested equitable remainder in fee in the equity of redemption, and that their rights were not affected or impaired by a decree of foreclosure and sale in a suit to which they were not parties, although the trustee vested with the legal title was made a defendant. *id.*

41. The fact that the trustee executed the mortgage of the estate under the authority of the court of chancery, and with the sanction and joint execution of a master of the court, as prescribed in the order; was held not to excuse the omission to make the remaindermen parties. *id.*

See CONFIRMATION.

DEED, 3.

EXECUTORS AND ADMINISTRATORS, 5 to 8.

PLEADING, 7.

PRINCIPAL AND SURETY, 1 to 6.

TRUSTS, 4 to 6.

U

UNINCORPORATED ASSOCIATIONS
OR SOCIETIES.

See CORPORATIONS, 1 to 5, 12.

CHARITABLE USES, 4, 9, 10.

USES.

See CHARITABLE USES.
TRUSTS.

USURY.

1. In an answer in equity, as well as in a plea in a suit at law founded upon a specialty, where the defence is usury, the terms of the agreement, and the quantum or rate of the usurious premium or interest, must be stated specifically; and the proof must come up to the statement in the pleading. *Rowe v. Phillips*, 14
2. Proof of the plaintiff's admission that he had taken usury, will not support a plea setting forth a particular sum or rate per cent; nor will proof that he exacted a certain rate per cent sustain a plea alleging the taking of a sum in gross which does not correspond with the rate proved. *id.*
3. Where the answer charged that the mortgagee exacted \$112 50 for usury; and the testimony consisted of his admissions, that he had taken usury in the mortgage, also that the mortgagors paid him more than seven per cent, and that they paid him ten or twelve per cent; neither of which rates would produce the sum named; *held* that the proof did not support the answer. *id.*
4. A commercial house in New York drew their bills of exchange, on a house in London, and sold them on a credit, to the payees, before acceptance, for a price which was $2\frac{1}{2}$ per cent. beyond the then current price of exchange between New York and London. There was no allegation that it was a loan, or a cover for a loan. *Held*, that the transaction was not usurious. The charge of two and a half per cent. beyond the cash price of the exchange, did not make the transaction usurious. *Holford v. Blatchford*, 149
5. On an application to purchase foreign bills, on credit, the drawer demanded nine and a half per cent. premium, one per cent. commission, and interest on the whole till paid. *Held*, on the testimony, that the commission was a part of the stipulated price of the bills, and was not to be deemed a compensation for forbearance or giving day of payment, and that the contract was not usurious. *id.*
6. If the commission had been included for forbearance, *quære* whether it should not be construed as two distinct contracts: 1. For the sale of exchange at $9\frac{1}{2}$ per cent. premium; and 2. An agreement to forbear payment of the price for sixty days, in consideration of the legal interest and one per cent. commission? *id.*
7. Where the answer states a contract as a sale and purchase of foreign exchange, without any averment that it was a cover for a loan, or that there was an application for a loan which assumed the form of a sale, the defendant cannot prove those facts, or insist upon them, although he has inserted a general allegation that the contract was usurious. *id.*
8. W. was the accommodation indorser of his son N., on a note to B., payable at the complainant's bank, on the 31st July. By an error of their clerk the note when left for collection, was entered as due 31st August, and was not presented for payment at its maturity, nor any notice of its non-payment given. N. was aware of there being a mistake at the bank as to the time when the note would fall due; but to provide for its renewal in case it should be properly presented, he prepared a new note for the same amount dated 31st July, and his check for the discount, and left the same with his partner who was the notary of the bank, to obtain his father's indorsement on the note, and renew the old note if it were presented on that day. W. on the 31st July called on the notary and indorsed the new note, but nothing was done with it. B. claimed the amount from the bank on the neglect to charge the indorser, and the bank paid B., and then sued W. on the old note. W. defended the suit. Some months after, two large mortgages of W. to the bank, on distinct parcels of land, fell due, and W. desired an extension of payment. The result was an agreement, by which W. paid about one-third of N.'s note, and executed a new mortgage to the bank for the amount of the two former, payable at a future day, and embracing both parcels of land. *Held*, that the mortgage was not usurious. *Brooklyn Bank v. Waring*, 1

V

VARIANCE.

The bill set forth a sale of exchange at the current rate, for the price of which, a certificate of deposit was given. The suit was for the recovery of the price, and the proof showed that the sale was made for $1\frac{1}{2}$ or $2\frac{1}{2}$ per cent. more than the current rate of exchange. The certificate having been given for the amount at that rate: *Held*, that

that there was no variance between the bill and the proof. *Holford v. Blutchford*, 149

See BANKING ASSOCIATIONS.
WILL, 3 to 6.

VENDOR AND PURCHASER.

See BONA FIDE PURCHASER.
SPECIFIC PERFORMANCE.

VESTED OR CONTINGENT.

See REMAINDERS.

VESTED RIGHTS.

See LIMITATION OF ACTIONS, 6, 7.

VESTRY.

See CORPORATIONS, 6 to 13.

VICE-CHANCELLOR.

See DECREE, 1, 2.

VISITORIAL POWER.

See CHARITABLE USES.
DEED, 3.

VOLUNTARY AGREEMENT.

See DEED, 3.
DONATION.

W

WILL.

- I. Agreement for making will. Jurisdiction of equity in their construction.
- II. Extrinsic or parol evidence to affect a will, and circumstances regarded in its construction.
- III. Construction of will; and when it effects a charge or conversion; Validity of its bequests, devises and trusts.
- IV. Abatement and Ademption. Computation and payment of legacy.

WILL, I.

Agreement for making will. Jurisdiction of equity in their construction.

1. A parol agreement, to leave lands to a person by will, though founded on a precedent valuable consideration, cannot be enforced in equity. *Harder v. Harder*, 17
2. The court of chancery will not sustain a bill for the mere purpose of construing a will. It is only when questions under the will, arise incidentally in the exercise of the legitimate powers of the court, where it has jurisdiction for some other purpose, that such construction can be given; as in cases of trust, account and the like. *Emmons v. Cairns*, 369
3. Such jurisdiction is maintained, at the suit of one claiming the personal estate after the determination of a life interest, asking to have an account taken and the fund secured; so far as to determine the right of the claimant to the remainder in such fund. *id.*

WILL, II.

Extrinsic or parol evidence to affect a will; and circumstances regarded in its construction.

4. Where in bequests for charitable purposes, the name of the legatee is defectively described extrinsic evidence is admissible to show what society or corporation was intended by the testator. *Hornbeck's Executor v. The American Bible Society*, 133
5. An abbreviation in the name of the society intended, does not vitiate the legacy; and resort may be had to a prefix applied to another society, and occurring in the same sentence, to complete the designation. *id.*
6. Various facts admitted in aid of construing a will and ascertaining the objects intended by the testatrix in her bequests for charitable purposes, viz. that the testatrix was a member of a society claiming the fund; she was attached to a specified sect or denomination; she had in her life made donations to such society; she was a correspondent of its officers, and had taken a warm interest in its particular objects; her deceased husband had exhibited such interest, and had made similar gifts personally and by his will; as his executrix, she had transmitted the latter; and that there is no other like society or institution. *id.*

7. In the construction of a will, the extent and situation of the property, is a proper extrinsic circumstance to be considered in ascertaining the intent and object of the testator. *Mason v. Mason's Executors*, 432

8. Words in a will importing a joint bequest or a union of interests, construed as bestowing separate and distinct shares and interests, from the nature of the things given, and the directions as to their disposition and enjoyment. *id.*

9. So words in the conjunctive, will be construed disjunctively and as distributive, when the intent of the testator requires it. *id.*

See WILL, 10, 26 to 29, 36 to 43.

WILL, III.

Construction of a will; and when it effects a charge or conversion. Validity of bequests, devises and trusts.

10. Where a husband gave to his wife by will, in lieu of dower, a *decent and comfortable support and maintenance out of his estate in sickness and in health during her lifetime*, leaving the residue of his property to his two children, it was held that such allowance was not to be measured by the sum requisite to support her in a boarding house; but that she should have sufficient to maintain her in housekeeping at the place of her residence, and in the manner to which she had been accustomed while living with her husband; it appearing that the sum necessary for such a maintenance was less than the interest on one-third of the testator's estate. *Tolley v. Greene*, 91

11. A testator having two bond debts payable on demand with interest, against F. the husband of his granddaughter G., gave one-ninth part of the bulk of his estate to trustees, in trust, first to pay to his executors out of the same, *but not out of the annual income or proceeds*, all such sums of money as might be owing to him at his decease, by F., and secondly to pay to G. for her life, the net annual income and product of the residue of the trust property or estate, for her separate use. The ninth of the personal estate was not enough to pay half the principal of F.'s bonds. The trustees omitted for several years, to pay off F.'s debt, and used the testator's personal effects to improve his real estate and make it pro-

ductive. They then claimed that interest should be paid on the debt out of G.'s income from the ninth part.

Held, that no interest was payable on the debt of F. after the death of the testator, either out of the net income or the capital of the ninth part. *Janeway v. Green*, 415

12. Also that interest was to be computed on the bonds until his death, and paid to the executors. *id.*

13. F.'s debt is to be regarded as one due from a stranger, and it is simply a charge or burthen of a sum in gross, imposed upon the capital of the trust fund, and upon such a charge an obligation to pay interest cannot be implied except upon the plain intention of the person by whom it is granted. *id.*

14. There is no equity in the case which requires G. to pay out of the income such sum as it has been benefitted by the trustees omission to pay the debt of F. *Non constat*, but that the whole estate has been benefitted in a corresponding degree by such omission. *id.*

15. Where a will directs an executor to invest a large personal estate, given ultimately to four legatees on their becoming of age, and out of the interest to pay their support and maintenance, sundry small legacies, and an annuity of \$100 during their pleasure, with power to increase it in the discretion of the executor; and the executor after paying the annuity without increase for twelve years, divided the estate, appropriating \$10,000 as a fund for the payment of the annuity, and a legacy of \$500 and the support of that legatee which was charged on the estate during minority; and then divided the residue:

It was *held*, that this act was an exercise of the discretion of the executor, so far as to limit the future increase of the annuity to the clear remaining income of the fund set apart after defraying the other charges upon it; and neither a subsequent administrator or the court acting upon the fund, could increase the allowance beyond that limit. *Case v. Towle*, 426

16. Where a testator directs his executors, after paying legacies, to sell his real estate to the best advantage in their power, and as sound discretion might direct, and then to divide the whole proceeds equally among his children; there is an equitable conversion of the land; the quality of personalty is given to its proceeds to all intents; and it is to be considered in equity as personal

- property for all the purposes of the will.
Martin v. Sherman, 341
17. The executors under such a will, made a sale which was alleged to be invalid by the heirs of one of the daughters of the testator who survived him. Her husband having ratified the sale and received a part of the proceeds; *Held*, that her husband was entitled with her assent to receive her share of the proceeds, and that his ratification of the sale was conclusive in respect of the same. *id.*
18. Where a testator directed his executors to sell his lands and to distribute the proceeds amongst various persons together with sundry charitable institutions; it was *held* that there was a conversion of the real estate and the gifts were to be treated as legacies. *Shotwell's Executor, &c. v. Mott*, 46
19. It was also held, that if they were to be deemed land, they were nevertheless valid, because the revised statutes relative to Uses and Trusts, do not apply to Charitable Uses. *id.*
20. A bequest for the use of the poor of a town, and one to an unincorporated religious association for the use of its poor ministers, are not within the provisions of the statutes against perpetuities. *id.*
21. The revised statutes against perpetuities and regulating uses and trusts, were aimed at private trusts and accumulations for remote posterity. Public trusts and charitable uses were not within the intention of the legislature, or the spirit and object of the enactment. *id.*
22. The English statute of Uses, 27 Henry VIII., did not apply to public uses or charities. *id.*
23. Charitable uses were bestowed in England, and were recognized by law, before the Norman conquest; and they were always fostered and protected by the common law. They were subject to the jurisdiction of the court of chancery long before the statute of Charitable Uses, 43d Elizabeth; and this, whether the trustees were a corporation or individuals, and whether the gift were to trustees by name, or for a definite and specific object without naming trustees. *id.*
24. A bequest for the benefit of poor ministers of a specified religious denomination, is valid, though it does not appoint the trustees of the fund. And it is competent for the testator to empower the executors and trustees of his will to designate the first trustees of such fund. If it were otherwise, the trust would remain and the court of chancery would appoint the trustees. *id.*
25. A bequest for the ministers of the New York Yearly Meeting of Friends called Orthodox, who are in limited and straitened circumstances, is not too vague or uncertain, or too indefinite in its objects. So of a bequest for the relief of such indigent residents of the town of Flushing, as the trustee or trustees of the town for the time being should select. Both gifts were held to be valid. *id.*
26. Bequests for charitable purposes to unincorporated societies, are sustained, where the object is competent, and is designated or may be clearly ascertained. *Hornbeck's Executor v. The American Bible Society*, 133
27. Where a bequest is given to a seminary or charitable institution by name, which is only a descriptive name of a particular institution or charity established and conducted by an incorporated college or society; it is a valid legacy to such corporation to be applied in respect of the institution designated. *id.*
28. So held upon a bequest to a theological seminary, which was an institution established and conducted by the synod of the Dutch Church; and also on bequests to the boards of missions, which were established and conducted by the same Synod. *id.*
29. On the construction of a will, legacies to the "Treasurers of the following societies, Am. Bible, Tract, Synods Board of Missions, Domestic Missions, N. Y. Colonization and Seaman's Friend;" were held intended for The American Bible Society, The American Tract Society, The General Synod of the Reformed Protestant Dutch Church, The New York State Colonization Society, and The American Seaman's Friend Society. *id.*
- See WILL, 4 to 6.
30. A testator gave to his wife for life all the income, rents and profits of his real and personal estate; and after her death gave the like interest to T. for life, out of which she was to support three infants, W., J. and E. Next, he gave the whole rents and income after her death, to W., J. and E. for life, as joint tenants; and then gave the residue of his estate to E. absolutely and in fee, first providing for her fifty thousand dollars when

she should arrive at age. Then followed a provision that if E. should die without children or issue, that the whole residue of his estate should go to his cousins.

In a suit by one of the next of kin, in which a construction of the will as to the personal estate became requisite ;

Held, 1. That the two first life estates in the income and profits were valid.

2. That the subsequent gifts of the personal estate were void as suspending the absolute ownership more than two lives in being at the death of the testator.

3. That the legacy of fifty thousand dollars to E. was contingent on her attaining her full age, and was void for the same cause.

4. That T. was not entitled to enjoy the personal property for life, in specie ; but that it must be converted and permanently secured, so as to give her the income, and preserve the capital for the next of kin.
Etchings v. Cairns, 369

31. A testator having a wife and two small children, and also four adult children by a former wife, after giving legacies to the latter, directed his executors to convert all the residue of his estate and invest it in stocks or on real security, so to remain until the death or marriage of his wife, and until the youngest child should become of full age. Out of the interest and income, they were to pay his wife an annuity half yearly so long as she remained sole, and to his two infant children each an annual sum in half yearly payments, varying according to their age from time to time. Each was to have £1000 on her marriage ; and when the youngest became of age and the widow's annuity ceased, the residue was to be divided equally between them. The will further provided in the mean time, that all the surplus interest and income, after paying the annuities, should be divided among the four adult children, semi-annually. The income of the residue of the estate was insufficient to pay the three annuities during ten years that the widow survived. After her death it was more than sufficient to pay the two infants annuities.

Held, that the surplus sums then arising, must be applied to the discharge of the arrears of the three annuities which occurred prior to the widow's death, before any of them could be divided among the adult children. *Stewart v. Chambers*, 382

32. The direction for a half yearly payment and distribution, was held on the general intent of the will, to be a regulation as to the time of payment to the wife and two minor children, and for a division after they were fully paid. And the testator's intent

would be violated by a division of the surplus of any half year, leaving any portion of the annuities unpaid which fell due previously. *id.*

33. But the adults having received a surplus when there were no arrears, would not be required to refund, on the income subsequently becoming deficient to meet the current annuities. *id.*

34. The arrears to the widow became a debt due to her as they respectively accrued, which was a charge upon the income accruing after her death. *id.*

35. An annuity to one of the infants, which on a literal reading of the will was to terminate, on an event that might leave her unprovided for at fifteen, and which did occur when she was twenty ; held to continue thereafter in the same manner as her sister's was directed, upon a construction of other clauses in the will, and its general intent. *id.*

36. A testator having three sons and four daughters living, and six grandchildren the issue of a deceased daughter and of her husband, G., by his will gave to three of his daughters each one-fourth of his real and personal estate absolutely, and another fourth to G. and his children ; and then devised and bequeathed the remaining half of his estate to his executors, in trust to rent, invest and improve the same, and receive and collect the rents and income, and out of the income, to pay yearly annuities, (unequal in amount, but each considerably less than one-eighth of the income,) to each of his three sons, J., H. and M. and to his daughter H. A. The latter was to cease on her surviving her husband, and she was then to take one-fourth of the half absolutely ; and if her husband survived her, her annuity was to continue to him for life, and the eighth of the estate subject to that annuity, was to vest in her issue by representation. On the death of the sons J. or H. leaving a widow, she was to have the annuity of her husband during her life. The trustees were clothed with a discretionary power to increase the annuities of the respective sons, and the daughter H. A., during their lives. If the net income of the trust fund exceeded the annuities, the surplus as to three-fourths accruing after a month from the testator's death, was to accumulate equally for the benefit of the issue of J. H., and H. A. respectively during their minorities, and to be paid to them respectively at twenty-one. So long as either of those three were without issue, the sur-

plus of the income of their trust shares, after satisfying the annuities to them or the husband or widows, as the case might be; was to be paid to the three other daughters, and to the issue of H. A., to G., and to the issue of H. and J., if either had any; all taking *per stirpes*. On the death of M., who it was supposed would never have issue, the testator gave one-fourth of the trust fund, to the same devisees as last above expressed; and the surplus income of that fourth while he lived, was to go to the same persons and classes.

On the death of J. and H. respectively, other two fourth parts of the trust fund were given to their respective issue, subject to the respective annuities to their widows. But if either of those sons left no issue, the respective fourth parts, subject to the widow's annuities, were given to the three daughters first named, to G. or his issue, to H. A. or her issue, and to the issue of either J. or H. if any there were; all bestowed *per stirpes*.

Held, on the construction of the will, that the devise in trust of the half of the estate, was to be construed and taken as a devise of separate and distinct shares, each consisting of one fourth part of such half, on distinct trusts in respect of each; and that the power of alienation was not suspended as to any portion of the estate, beyond two specified lives in being at the death of the testator; and that there was no absolute suspension for a month, or for any designated period. *Mason v. Mason's Executors*, 432

37. The annuities to the two sons and the daughter, are not a joint charge upon the three-fourths of the trust fund; but each is a separate charge on the respective fourth parts given in trust. *id.*

38. *Held also*, that the trusts for the accumulation of the surplus income of the respective shares were valid. As to all the beneficiaries, the accumulations were to commence within two lives in being at the death of the testator; during the minority of the respective beneficiaries; and were to terminate as to each when he became of age. *id.*

39. It is a sufficient compliance with the provisions of the revised statutes as to such accumulations, if the persons for whom the same are intended, are designated or described as a class, *e. g.* as the children of a person named. *id.*

40. Where such a class is designated, it is not essential that all should be living when

the accumulation commences; provided at the commencement it goes for the benefit of such as are *in esse* exclusively, and that those who subsequently become entitled fall within the prescribed rules laid down by the statute. *id.*

41. Such a succession of accumulations, is not objectionable, if they are all made to terminate within the prescribed limits as to time in respect of the suspense of the power of alienation. *id.*

42. *Held also*, that a devise in trust for the payment of annuities out of the income of real estate, is valid. *id.*

43. Where there is a devise and bequest to trustees, one of whom is to take a beneficial interest in the trust property, he takes a legal estate to the extent of such interest. *id.*

See WILL, 7 to 9.

44. A testatrix devised real estate to three trustees in fee in trust to receive the rents issues and profits thereof, and pay the same to her grandson during his natural life; and from and after his death, in further trust to convey the same to his lawful issue living at his death in fee; and if he should not leave any lawful issue at the time of his death, then in further trust to convey the same to another grandson of the testatrix in fee, or to such person in fee as he might by will appoint, if he died prior to the tenant for life: *Held*, that the children of the tenant for life, (all of whom were born after the death of the testatrix,) took vested equitable remainders in fee in the real estate, as they were born respectively; which remainders were liable to be divested as to each on his or her dying during the lifetime of their father, and were subject to open to let in the after born children of the tenant for life. *Williamson v. Field*, 533

45. Under such a devise, no conveyance of the legal title by the trustees is now necessary in order to vest the whole estate in the children at the determination of the particular estate. *id.*

WILL, IV.

Abatement and Ademption. Computation and payment of legacy.

46. Where a testator bequeathed the dividends of twenty shares of bank stock, and it appeared that he had such shares at the date

- of his will and afterwards bought eighty shares more ; but sold the whole so that he had no such bank stock at his death ; the legacy was held to be adeemed. *Newcomb v. St. Peters Church*, 636
- sterling money, if paid to the parties here are to be paid at the par of exchange ; and if remitted, the executors are to purchase exchange on London for the amount in sterling. *id.*
47. Legacies for support and maintenance of a wife and children, otherwise unprovided for, do not abate with the general legacies. *Stewart v. Chambers*, 382
- See CONFIRMATION, 3.
DONATION.
EXECUTORS AND ADMINISTRATORS, 1 to 4.
LEGACY, 8, 9.
PERSONAL SUCCESSION.
48. Legacies directed to be paid in London in

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